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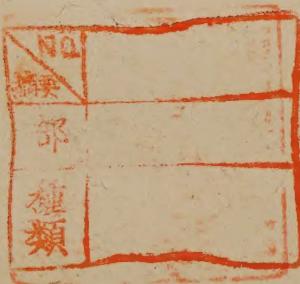
THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW

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ETC.



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實業解説の西側をもつて、伊（伊藤）が
都督の実業と政治の前途運営を主な目的とし、其
まほに教化を發する所は、士農工商の五族の
備蓄より一年半、政府の實業政策をもつて改
革の實業の導入をす。併せ日本實業の發展
を期す所は、既に内閣の主張されたる實業也
られに於て、伊藤公任は、實業の發展を指し、
日本の國財創設懸念等を挙げ、又改めて實業
の構造から經濟の發展、實業と經濟の結合
を、新興として之を實業上と上達せしむ
方針の實業は、根據院と國會の實力集結の上
に、實業の發展を主とする實業

The Facsimile of Count Kentaro Kaneko as it appears in his Message of Recommendation in Japanese.

アソソム(Asson)の南移行言語の如きは、現在
世界の何處かに分布せしものと見らる。上記算

事は今と後半もそれなりに
甚 畠井公の手筋と日本の書道と解釈するが、
今 日の国語と種々の筆の書道を書いた
政治の實力者と書道の解釈がなされた
筆の筋が書かれた筆の書道と解釈される
書道の筋と御本筋と書道の解釈がなされた

伯蘇全注經卷之六

PREFACE

Written by

Count Kentaro Kaneko, LL.D. (Harvard University),
H. I. Majesty's Privy Councillor

By the introduction of Count Raizyu Matsudaira, President of the House of Peers, I had recently a visit from Professor Shinichi Fujii of Waseda University, who showed me his English book on the Imperial Constitution of Japan and asked me to write a preface to it. According to Professor Fujii, he first finished a course in Waseda University, and then proceeded to England and America, where he specially studied constitutional laws for six years. I understand that after his return to Japan, he has decided to write an exposition of the Japanese Constitution in English with a view to making known the essentials of Japanese Constitutional laws in Europe and America. I have looked through the book as requested and found first of all that his English is quite perfect, with few traces in diction betraying ordinary Japanese authors. Next as to the method used, I find that he was not influenced by the principles of European and American constitutions, as is too often the case with other Japanese authors; instead he impresses me with his being correct interpreter of the Japanese Constitution.

Here I may recall the origin of the Japanese Constitution. It was first decided by Meiji Tenno, whose profound and far-reaching ideal materialized in the dispatch of Hirobumi Ito (later Prince Ito) to Europe. Prince Ito, in obedience to the Imperial command, went to Germany and stayed in Berlin for a year and a half, and all the while listened to the lectures and explanations on European and American constitutions under European constitutional jurists, and at the same time, made a close investigation of the actual condition of constitutional government in Europe and America. On his return to Japan, he reported to Meiji Tenno of the result of his study abroad. Thereupon he was appointed by

Imperial order to make the draft of a constitution, which was based upon the national history, institutions and customs of Japan on one hand, and, on the other, by taking into consideration the forms and theories of European and American constitutions. When the draft was made, he presented it to Meiji Tenno.

Thereupon Meiji Tenno created the Privy Council, whose membership was appointed from the men of distinguished services and administrative experiences. Then the Council was in session for nine consecutive months, every time attended by His Majesty, who took no heed of heat and cold. The draft thus decided upon, His Majesty caused it to be promulgated as the "Kintei Kempo," i.e. the Constitution granted by the Tenno, on the 11th day of the 2nd month of the 22nd year of the Meiji Era.

Following the promulgation of the Constitution I was sent to Europe and America by Imperial command to make an investigation of the internal organization of foreign parliaments, and prepare for the opening of the First Session of the Imperial Diet. There I presented the Japanese Constitution to many statesmen and distinguished scholars and asked for their opinions. The opinions thus gathered all proved unanimous in extolling the Constitution in high terms of praise. Especially Professors Dicey and Anson, then lecturing on the constitutional laws at Oxford, England, after a careful perusal of the text, went so far as to say that if ever a new-born nation were to entrust them to make the draft of a Constitution, they could not write anything superior to the Japanese Constitution.

In short, the present book by Professor Fujii may well be said to embody the spirit with which Prince Ito drafted the Constitution, based principally upon the national history and fundamental political principle of Japan.

Count Kentaro Kaneko

Onshi-shoso, Hayama,

November 11, the 14th year of Showa.

THE AUTHOR'S PREFACE

In sending out this book to the English speaking public the author hopes to supply what he conceives to be a long-felt want among students of the Japanese state. Indeed, this is a treatise on the Japanese Constitution aiming at the clarification of the nature of the Japanese state, which is in many respects different from others, often giving rise to various questions beyond comprehension to foreigners unless by means of special explanation. It is a book not only for general enlightenment but for all law students who may care to extend their studies for purposes of comparison or otherwise.

By the Japanese Constitution the author means not only the formal constitution, i. e. the Constitution of the Empire of Japan, but even all the substantial constitutions of the country. The former is a code of written provisions granted and promulgated by the august Tenno (Emperor) of Nippon under the title of *Dai Nippon Teikoku Ken-pō*, or the Constitution of the Empire of Great Japan; while the latter comprise all the fundamental laws of Japan relating to the Japanese state, both in spirit and in concrete provisions, without regard to the title by which each of these laws is known. These laws include the Imperial House Law and the Supplement thereto, consisting of fundamental rules essentially relating to the existence of the state as such, the

Imperial Oath at the Sanctuary of the Imperial Palace, the Imperial Speech on the promulgation of the Constitution, and the Preamble to the same, together with the *Shosho*, *Chokusho*, and *Chokugo*—all being Imperial Rescripts known by these different names according to the occasions on which they were issued —, the Ordinance on the Imperial House, the Ordinance on Treaties, laws supplementary to the Constitution of the Empire of Great Japan, and even the constitutional customary law and convention. No country in the world is without these constitutional laws, some parts existing in the form of statutes and others as customary law and convention. Wherever men organize themselves into a state, a constitution is necessary for a proper recognition of the order of that state. It is truly said that where there is a state there is law, and where there is law there is always a constitution.

A proper understanding of the Japanese Constitution, the author believes, will prove contributory to the right understanding of Japan and the Japanese, so universally sought for, a tendency brought about by her admittedly marvellous advance during the past seventy years. Books, pamphlets, and magazine and newspaper articles on Japan are not wanting, whether in English or in other languages, and their number is increasing. They are all helpful in one way or another, and the author, as a member of the Japanese nation, has every reason to offer thanks and wish every success to those writers,

whether they may be in the field of politics, or of science, or of commerce and industry, or of art and literature, or what not. However, he very much doubts whether anything Japanese can at all be fully understood without a certain amount of knowledge of the question: What is the Japanese state? For, indeed, any and everything purely Japanese has about it reflected the essential nature of this unique state. The study of this question necessarily forms a part of the study of the Japanese Constitution.

The reader will find that beginning with the foundation of the Empire, the author proceeds step by step with a discussion of the essential nature of the state from every angle until he comes to the Constitution proper. This is an attempt to prepare the reader for a satisfactory understanding of the latter part. Thus the former part sets forth all the essentials that cannot be overlooked for preliminary study, while the latter embraces all possible facts about the Constitution made easy to understand for a mind prepared by the former. The reader will also find, throughout the book, frequent quotations from and no less frequent reference to foreign sources. This is again to facilitate understanding by means of comparison. Lastly, the author's reflections will, it is hoped, enable the reader to grasp the gist of all that has been said in the foregoing chapters. Even by a perusal of that part alone will he be able to see clearly what the Japanese state is.

One particular fact needs special mention. The

reader will here and there come across legal expressions that are unfamiliar in ordinary law books. Some of them are of the author's own coining out of his desire to give expression to what he really means; others are simply the literal rendering of the already existing Japanese expressions for English and other technical terms; still others are purposely made to savour of what is essentially Japanese. In short, he has boldly adhered to his conviction that, since he is a Japanese, he ought naturally to write like a Japanese without any false ambition on his part to appear otherwise. He means to say that he has not concerned himself too much about customary terms in ordinary use. If this book contributes in any way to a better understanding and appreciation of the Japanese Constitution, the author will feel himself amply repaid for his trouble.

Shinichi Fujii.

Acknowledgements

The author's thanks are due to Count Kentaro Kaneko, who has so kindly given him his view of the present book. The author may add here that Count Kaneko is the oldest living and the most eminent constitutional jurist in Japan who participated in the historical work of drafting the present Japanese Constitution. The count is held in great respect as the highest authority on the Japanese Constitution.—S. F.

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THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW

PART I A STUDY OF THE STATE CHAPTER I SCOPE AND METHOD

HE Empire of Japan is a country founded on divine will. It is the only country in the world that has typically realized the principles of the Family State. Radically different from some European countries, Japan was brought into being neither by contract nor by conquest. It is a great Family State founded by a grandson of the Sun Goddess^①. Inhabited by the Yamato race and reigned over and governed by the successive Tenno^② of an unbroken lineage since its foundation, the country has never undergone any

^① Amaterasu-O-Mikami (天照大神), or the Heaven-illuminating Goddess, or simply the Sun Goddess. She shone beautifully, and lighted the heavens and the earth. Her father, therefore, transferred her from earth to heaven, and gave her the ethereal realm to rule over. At this time the earth was close to heaven, and the goddess easily mounted the pillar, on which heaven rested, to her kingdom. See W. E. Griffis' *The Mikado's Empire* (1876) p. 45.

^② Tenno (天皇) is the Japanese for Emperor. Jimmu Tenno (神武天皇) was the first Tenno of Japan, generally called the founder on that account. His original name was Kan-Yamato-Iware-Hiko-no-Mikoto. The title Jimmu Tenno, meaning the spirit of war, was posthumously applied to him.

change whatever in the Family System on which the government is based. Thus we can clearly see that the Empire was originally a family, a great family with the Imperial Family at the centre. Naturally, the relations of the Sovereign and the subjects are not such as have developed from legal ideas of rights and duties as in other countries. Far from it, they are those that are seen between parents and children, having developed from historical ideas. In such unique relations the Tenno exercises His sovereign power over the people just as the head of a family exercises his control over its members.

The fact that the Tenno assumes the position of Head of the Empire as holder of the sovereign power is in no wise the result of the promulgation of the Constitution on February 11th in the 22nd year of Meiji (1889), but the origin is to be sought in the foundation of the country in the long distant past. In other words, His sovereign power was established at the time when the Imperial ancestor Amaterasu-O-Mikami, on the occasion of the descent of her grandsons on this land, appointed one of them, Ninigi-no-Mikoto, to the leadership of the country, handing him the Three Sacred Treasures, saying: "This country of Goodly Grain of Ashihara (Japan), with the promise of tens of thousands of mellow autumns to come, is the land that shall be ruled over by Our descendants. Ye, Our descendants, come and govern it. The prosperity of thy descendants shall last as long as Heaven and Earth." Naturally, ever since

its foundation the dominant idea in the minds of the successive Tenno has been to govern through the Imperial family in which the Tenno is the holder of the sovereign power, at the centre. This creed has been transmitted through the whole line of Tenno, and will be transmitted to their successors, even to all eternity. Article I of the Constitution reads: "The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal"; and herein is revealed most solemnly the principle of 'government with the Imperial family at the centre.' Herein lies the difference of our state from that of England, for instance, where the king is regarded as the holder of the sovereign power with regard to state affairs only when he assumes the kingship, but not when he stands independent of Parliament. Thus in the study of the spirit of the Japanese Constitution it is essential to proceed with the above considerations constantly in mind.

CHAPTER II

THE STATE

SECTION I THE ORIGINS OF THE STATE

WHAT is the origin of a state?^① What are the foundational elements constituting it? About these questions, which necessarily concern the question of the essential nature of a state, there have hitherto been brought forth various theories and arguments. Those about the origin of a state, in particular, may roughly be classified under at least four heads, thus: (a) the divine will theory, (b) the family theory, (c) the contract theory, and (d) the conquest theory.

According to the divine will theory, a state comes into being by divine will. In other words, it insists on what is known as the divine right of kings, and holds that a state is an institution of deliberate divine creation. In such a state the monarch is a divine agency, against whom no man under his control can insist on his individual rights. In Europe, as history shows, the theory originated during the period of the sixteenth and seventeenth centuries in the growing ideas of the people's sovereignty against the Papal ascendancy. Unlike the Japanese idea of the

^① R. M. MacIver, *The Modern State* (1926), pp. 25–50; S. Leacock, *Elements of Political Science* (1921), pp. 21–37; W. W. Willoughby, *Nature of the State* (1896), Chaps. iii, iv, v, vi.

country being of divine origin, of which mention will be made later, it is quite doubtful whether the people in such a state really believed in its divinity and based all their activities on this belief; for it is historically clear that, in Europe, the theory was first offered by monarchical governments to defend themselves from the ever-increasing tendency to democracy. It is a doctrine built up by clever minds compelled by necessity to counteract that tendency. It is, however, still found remaining in the thought of some people in countries of Europe such as Great Britain, France, etc. Now turning to ancient Egypt, one sees that the kings were regarded as incarnate gods having the power of life and death, and warranted in all doings, capricious and arbitrary. This shows that their country was held in the light of a divine creation, political power having been vested in these kings in one or another special way and by the special intervention of divine will. Turning again to the Hebrew lawmaker Moses, one reads that he received at Mt. Horeb a divine command to return to Egypt, from which he later led the Israelites to Canaan and received the Decalogue from Jahveh at Mt. Sinai. Then that king of Babylon, Khammurabi, received the remarkable code of laws from the sun-god Shamash. These accounts also point to the divine origins of these rulers, and therefore, of their states. It may be added that in England this doctrine was most in evidence during the reigns of James I. and Charles I., and the clash be-

tween it and the ideas held by the parliamentarians was the fundamental cause of the Civil War (1642-1649). Later, in 1661, Sir Robert Filmer, a "parasitic apologist of the later Stuarts," as S. Leacock calls him, wrote a book in which the writer supposes "the paternal right vested at the creation in Adam" to have passed "by descent to the kings and princes of Europe." This is an extreme instance of daring support of the divine right of kings. Here it may be recalled that every history of the foundation of a country more or less savours of a divine origin in some way or other, which nearly all critics consider unworthy of serious refutation. When, therefore, the Japanese state is represented as a divine state, in which Japanese faith has remained unshaken even to this day, it may naturally be regarded as but another absurdity, but the Western public has yet to see what is going to be said later in this book.

Secondly, the family theory, by which the family is taken to be the primal unit of society, supposes the origin of human organization to have been derived step by step first from a household, which developed into a patriarchal family, then into a tribe of persons of the same kinship, until there was a nation. This view was held by many in early times, notably by Aristotle, who in his celebrated *Politics* explains how at first a family branched out into several families, finally forming a village, and how the village branched out into several villages, form-

ing finally a community, then, last of all, a state. This view is plausible at first sight, but the historical researches of the last century introduced the theory that men were at first found in groups or "hordes," there being no such relations of husband and wife, that relationship in such a primitive time was traced, not through the father, but through the mother, men being polygamous, and that it was only after the patriarchal system emerged out of that condition through the adoption of settled pastoral and agricultural habits and of monogamy that there appeared what is known by the name family with the father at the head. It must not be supposed, however, that social development has always been along this same line. It may have been along some other line. It is not so simple an affair as to lend itself to any one formula. This much at least is certain that men after the matriarchal stage lived in families and that there was no single form of family in the beginning, completely upsetting the Aristotelian theory. When, however, the Japanese state is referred to as a family state, as will be seen later on, it is seriously meant that it did evolve out of a single family, no matter what objection may be raised against it and in utter disregard of the probable question as to whether the primitive Japaness were also found in hordes or packs before there was such a family or whether this particular family was one out of the many that there may have been. -

Thirdly, the contract^① theory, or the theory of social contract, as it is often called, seeks to explain the beginnings of the state by the supposed joining of primitive men into one civil society in which each member submits himself to the control of all, receiving in return the protection he needs for living in safety. This theory, which is historically the most important of all the different views of the state, was first advocated by natural jurists in the seventeenth and eighteenth centuries. It first assumes that the history of mankind may be divided into two stages, the first being previous to the establishment of government, when men lived in the natural state, and the second being after it. In the first stage men had no code of laws except that of nature. In the course of time they found it inconvenient to live in an isolated and independent condition and were of necessity led to combine into one society, as has been said above, giving up for ever the life of isolation and receiving protection in exchange for obligations incurred. When men thus became joined together as one body, they soon learned to wish for power over other similar societies of men. These two motives stimulated them to form what is now a state. The origin of this theory may be found in the philosophy of the Greeks, but there is reason to suppose that it was quite foreign to Plato and Aristotle. England and France produced in the seventeenth and eighteenth centuries many

^① J. J. Rousseau, *Social Contract* (1762), Bk. I, Chaps. i-ix.

exponents of this theory, Hobbes^①, Locke^②, and Rousseau among the number, while among the hostile writers may be counted such names as Hume and Bentham. It is often said that the United States is a country born of contracts. Apart from any attempt to say anything definite about it, this much may safely be said that if by this statement it were meant that a particular form of government may sometimes be established by contracts, one would find it hardly possible to offer contradiction to it.

Lastly, the conquest theory, also called by some the theory of force, gives sanction to the proposition that might is right. When there were only a very few human beings in the world, things may be supposed to have gone all right among them, but with the gradual increase in their number, whether being in hordes under the matriarchal system or more organized under the later patriarchal system, the strong naturally came to oppress and capture and enslave the weak, out of an instinctive desire to dominate over them. Such a process went on continually wherever there were human beings, the strongest always wielding the greatest power, whether in a group, or in a clan, or in a tribe, or in a community. Thus the gradual growth from village to town, from town to city-state, as in Europe, and from city-state to kingdom was nothing but a continuation of the

① Thomas Hobbes wrote on this theory in 1651 in his *Leviathan*.

② John Locke, an illustrious contemporary of Hobbes' and once tutor to James II. He wrote a treatise on Government in 1690.

above process. In medieval Europe this theory was held in most favour by the fathers of the Church and other religious men, apparently for the purpose of illustrating the subordination of the earthly power to the spiritual kingdom. They intended by this theory to defame the temporal power in favour of the spiritual authorities. Bluntschli, that Swiss writer on politics in German, sees in the conquest theory a justification on the ground that it is based on one prominent element, viz. force. According to Ludvig von Haller, the theory assumes a plausible aspect when he says that, exactly in the same way as the sun warms man, and man in turn depends upon the sun for its beneficent rays, are the weak under the control of the strong as the order of the universe, not in the sense that the former are in the nature of things brought under subjection by the latter, but in the sense that the former depend upon the latter for protection. Apparently this view will be useful for a justification of absolute monarchy and, of unlimited submission on the part of the governed.

Here it must be pointed out that when the Japanese state is mentioned as a monarchy, it is not intended to clothe that monarchy in von Haller's logic. When Jimmu Tenno is referred to elsewhere as starting on the expedition for the pacification of the remotest parts of the country, he did not mean to subjugate the people in the sense of what von Haller may say in these modern times. The Tenno's aim was the carrying out of the heaven-ordained

mission, that is, the benevolent looking after of the people in obedience to the divine will.

So much for the origins of the state, roughly sketched, but it does not follow from the above enumeration that all states may have their origins traced back exclusively to one or another of these four categories, since the time of their birth is varied and different races, with different cultures, environments, and other conditions, may naturally be conceived to constitute different states. Especially when one stops to think of the origins of the modern states, one wonders if something different from and more certain than what has been said above may not be brought forth; and so it indeed can be. Whereas it has been seen that the state emerges naturally in society, according to one or another of the four ways or to still another way and gradually taking on its own form and character, modern states may be said to be but re-births or re-constructions. Again, whereas the origin of an ancient state is more or less shrouded in mystery or has something supposititious in it, that of a modern state is pretty much within the knowledge of the present generation. The newer a state, the more certainly can the origin be grasped. It may also be said that whereas an ancient state naturally originated in human society in the remotest past, a modern state may be said to have "risen" so to speak, out of the ruins, of its predecessor. Here a reflection most likely to impress everybody is that most of the states of the

modern world are but a few centuries old. In these days of international complications, there is no telling when there may rise a new state, when an already existing one may be annexed to another more powerful one, and when another may lose its existence for ever.

One may ask, and with reason: What are the causes of this mortality among states, of such new births, of such disappearances? The causes are many, and varied, too, and since any explanation of such matters is not within the scope of the present book, they may with advantage be dropped. One thing needs attention, and that is that the Japanese state is one that rose in the remotest past, of which mention will be made later on, but has persisted throughout all these long ages in the form in which it was founded, quite intact; quite entire, quite unimpaired.

SECTION II THEORIES OF THE STATE

A general survey of various theories of the state^① convinces us that the state is neither an absolute nor objective existence outside of our minds, nor is it a relative and subjective one merely conceivable in our minds. The state exists either inside or outside of our minds according to our points of view. It is neither an abstract creation of our minds,

^① F. Pollock, *History of the Science of Politics* (1916), Chap. i; and J.K. Bluntschli, *The Theory of the State* (1885), Translation of 6th edition), Chaps. i. ii. iii.

nor is it an imaginary existence, nor a philosophical, much less an objective, existence growing and developing beyond the range of our consciousness. Here arises a double-sided view of the state, one being sociological and the other legal. Now we see that a nation, a territory, and its governing system are the three essential elements common to various state phenomena. On this ground Ratzer says that society leads its life, on and by the land, and when it becomes organized, it assumes the form of a state. Fishbach^① sees the material elements of the state in land and people. That area of land which is the foundation of the national existence is known by the term territory. The fact that the state has its governing system is attributable to the necessity for the state to place its component members under a fixed control that it may accomplish its aim. Writers on the pluralistic theory of the state advocate a new structural principle of the state by denying the sovereignty of the state; and all this simply because they thereby mean to disregard the idea of control and restriction by the state.

On the above-stated points all theories are at one, but these alone are not enough to make clear the essential nature of the state. In order to settle this problem, it is necessary to examine first these external elements, especially the essential nature of the governing system, and then study the difference between the state and various other organized bodies.

① *Allgemeine Staatslehre* (1922).

Absolutistic theories of the state and relativistic theories of the state are in their own ways indeed views on the essential nature of the governing system, but of these different views, the community theory is the more acceptable. The community theory insists that the state is a single whole composed of the people, not only in the sense of people living at the present time, but also in the sense of those who, having received life from far-off ancestors, are to transmit it to future generations, that it is an eternal living body, and that it has a purpose and a will-power of its own.

(1) *The state has its own purpose of existence and is built for no other purpose.* Just as an individual purposes to lead an existence of his own, so does the state purpose to lead its own existence. The fact that a community of human beings as a whole has a purpose and active energy, is known as a result of psychological considerations, and not by outward recognition through our senses. Therefore, in the study of social sciences, psychological and internal research are always necessary, not to speak of external observation. It was supposed in the primitive age when group ideas were as yet undeveloped that only a natural man could exist independently. In our way of thinking today, we recognize that a community, such as the state, is also capable of independent existence.

(2) *The state is an everlasting entity.* Individuals composing a nation are subject to constant change,

but the state continues as a single entity; for not only does the state assert its territory as identical with itself and manifest the singleness of its will, but the people also have the consciousness that the state is a single entity. This consciousness exists not only among people of the same age but among people of different ages.

(3) *The state is an organized body.* This means an organized entity with an independent object and a will system to achieve that object. A will system means an organized body of people who have social consciousness, to frame the will of the community, which is commonly called the organ of the community. Therefore a will system is but another name for a system of organs, and an organized body means a body which has a system of organs.

On the above-mentioned points the state is exactly the same as any other community in nature. Three points on which the state is differentiated from other communities are: (a) that it is a community with sovereignty; (b) that it is a community occupying a fixed territorial area; (c) that it is a community of the highest^① order.

For convenience' sake, I should classify old theories on the essential nature of the state roughly into two classes, i. e. the relativistic and the absolutistic theories. I may call them the subjective and the objective theory respectively. The former stands

^① Here "highest" means that it is not subject to outward control against its own will.

on the view that the state is within man's will, while the latter is based upon the view that the state exists quite independently of man's will. When we examine closely these different views of the nature of the state, they may be divided into various theories.

ARTICLE I RELATIVISTIC THEORIES OF THE STATE

(1) *The psycho-organic theory.* This theory is the product of the period of transition from idealism in the early part of the nineteenth century to the organic theory after the middle of the same century. It regards the state as an organism, including, as the name suggests, more subjective elements than the natural organic theory points out, and sets value on the mental action of man. According to this theory, the state has mental and personal attributes, and the political development of the state and the various forms it assumes are regarded as similar to the intellectual development in all its stages as seen in an individual.

This theory is of two kinds, one being a psychological theory and the other a personality theory. The former was advocated by Röhmer and Welker, and the latter by Gierke and Stein. The psycho-organic theory as a psychological one held by Röhmer is that the state and its foundation or form ought to be within the mind of an individual. Röhmer says that the fundamental faculty of the mind can be analyzed into sixteen parts, of which eight belong to the intellect and the other eight to the

heart. Of each of these parts, one half is active, being directed outward, and, the other half passive, directed inward. Since the continued unity of these powers puts a human being as a whole under its control, the human body is regarded, after all, as a product of the mind, and indeed the state is the highest representation of this unity of powers. Therefore the state must exist within the mind of man, and its foundation or form must be within his mind. Welker compares the various stages in the political development of the state to those in a man's growth and says that the state, like an individual, passes the stages of boyhood, youth, manhood, and old age. And in each stage of such development, he says, the nature of "the government and its law" mirrors the special conditions prevailing during each of these periods, and is comparable to the psychological attitude of a man peculiar to each stage of his growth. He also says that the order of the changes of a government from monarchical to democratic, and then to absolute, and the development of a political party from radical to conservative are similar to the intellectual development of an individual.

Then writers advocating the psycho-organic theory as a personality theory of the state, take great interest in the analysis of the state, rather than in its historical development, compare the essential characteristic features of human beings to the attributes of the state, and regard the will of the state as identical with that of an individual. In doing so, however,

they place the former in a little higher and better position than the latter.

Furthermore, they assert that the state is a highly developed organism and is under the control of a conscious and independent intellect, the free will of the state being sometimes regarded as identical with the combined and unified will of the people, that the state maintains its own organic existence quite apart from the life of each of its constituents, and that the legal personality of the state is not a legal fiction, but, in fact, a living reality, the possessor of a more sublime and more perfect personality.

Gierke, a famous advocate of this theory, starting from the viewpoint that a human being has two qualities, that of an individual and that of a member of a community, explains that he has self-consciousness only when he is aware of these two qualities and regards the life of a community and that of a man in the same light, since the object of the existence of a human being embraces his own life and that of the community to which he belongs. He thus recognizes the life of a community as that of a human being, and calls the former a community person. According to him, a community person is an independent organism, that is, a general mind, will and consciousness, not only superior to those of an individual, but combined with the organism of the individual. Thus, he defines the state as a *community person* and, in that sense, as a general will resulting from an organic combination of the wills of individuals.

In short, the psycho-organic theory is not so radical as the natural organic theory, but is slightly modified, taking things in the natural world for its object, and defines the state as a collective body of individuals, by comparing its characteristics to those of individuals. There is, however, no solid theoretical ground on which to base the similarity of the characteristics of the state to those of individuals. The state, as universally recognized, is not only a body of individuals in the objective sense, but a community which needs a territory and other material elements. Accordingly, we find it difficult to justify any theory which seeks to regard the state and individuals in the same light.

(2) *The social organic theory.* This theory was advocated in order to correct the defects of the psycho-organic theory and to make clear the essential nature of the state, with special reference to sociology, which sprang up in the beginning of the nineteenth century. The tenet of this theory, after all, is that the state is a special organ within a social structure, or, a social structure viewed from a certain aspect.

The first advocate of the social organic theory was Auguste Comte^①, a Frenchman, supported by René Worms^②, Alfred Fouillée^③ of France, Herbert Spencer^④ of England, and Albert Schäffle of Austria. Auguste Comte in his work regards society as an

^① *Positive Philosophy.*

^② *Organisme et Société.*

^③ *La Science sociale contemporaine.*

^④ *Principles of Sociology*, Vol. I. (3rd ed.).

organism, and making a comparative study of society and various other forms of life, concludes that the natural harmony of various organs and their functions, first existing in planets and later made more perfect in animals, is to see its highest development in a social organism, which is but another name for the state, that is, inversely, a social organism. He says that social development is similar to organic development and any defect in a social structure should undergo pathological treatment like a disease in a living organism. Herbert Spencer regards society as an organism essentially similar to a living being, saying that the fundamental principle of evolution is an infinitely branching change from simple and uniform substances into complex and interrelated organisms. He regards society in the same light as a living thing and concludes that it is an organism. He does not make any distinction between the state and a society, but regards the two as one and the same thing, i. e. a social organism. Benjamin Kitte^①, too, adopts this theory and splits the difference between the natural world and society by means of religion, thus advocating that the laws of nature act in favour of social organisms at the sacrifice of individuals. He maintains that religion stands by the laws of nature and gives its superrational assent to a clash between the interests of individuals and those of a social organism. J. S. Mackenzie^② and

^① *Evolution and Ethics.*

^② *Introduction to Social Philosophy* (1895) (2nd ed.).

W. S. McKechnie^① argue that the state is essentially an organism and its nature can not fully and satisfactorily be explained by any other theory. Henry J. Ford, who examined conclusions derived from various investigations on biology, psychology, philology, and anthropology, regards a man as a product of social evolution and a state as a social organism. Paul Lilienfeld^② asserts that the state is a real organism and has in the highest degree all the essential attributes which differentiate inorganic life from organic life, by pointing out that a government is the brain of a social body and the supreme representative of social consciousness, and that a powerful central authority represents a developed form of political evolution. He also declares that the state is, like other organisms liable to diseases and putrefaction and that parasitic diseases in the form of ambitious instigators are among the greatest dangers. Albert Schäffle^③, elaborately analogizing the biological relations between society and a living

① *The State and the Individual* (1896).

② *Gedanken über die Socialwissenschaft der Zukunft.*

③ *Bau und Leben des socialen Körpers* (1896) (2nd ed.). "A still more complete presentation of the social organism is offered by the late Albert Schäffle, the distinguished Austrian statesman and economist, in his *Structure and Life of the Social Body*. Here the comparison of social with animal forms is carried to an extreme point, stopping little short of complete identification, though the author professes to be mindful of the differences existing between the two, and avoids the explicit use of the term 'organic.' Schäffle speaks of the 'morphology and the physiology' of society, the social limbs of technique," etc. See Leacock, *Elements of Political Science* (1921), pp. 82-83.

organism, states that various laws of the same kind control all phenomena, inorganic, organic, and social, and that the state is the social organism representing the highest central organ of social ideas and social powers. René Worms makes a biological comparative study of society and an organism, with special reference to structure, function, evolution, and pathology, and concludes that the state is the supreme form of society which is self-conscious and it is not only a social organism but a personality and a reality.

Thus it is seen that scholars differ in their methods of explanation, but all concur in regarding the state as an organism. In spite of all this, the state is in no way an organism; for different individuals have different wills and do not present a unified aspect like the various constituents of a living organism under the same control. Likewise the will of the state differs from the wills of its component units.

(3) *The theory of coöperative community.* Observation of the state as a community in no way constitutes a particular theory, for it is an already universally recognized fact that the state is a collective body. The question is: What sort of collective body is the state? The assertion that the state is a unified continuity of mankind, that is, a coöperative community, is worth consideration as a theory. This theory has been studied both historically and sociologically by various scholars, of whom the oldest is Aristotle. He did not distinguish the state from

society; but held that a man is a political animal and cannot attain perfection as such without living a group life and that a community originates in a family, which in turn develops into a coöperative community of village and town, then into a combined association, i. e. a coöperative community, in which alone man can make perfect growth. This coöperative community he named the state. He regards, therefore, the state as a product of nature, a perfected form evolving out of a group. Further he distinguishes the state from a government and says that the state is a collective body of citizens, while a government is a body of people who control the state, give orders, assume state duties, and are vested with the supreme authority generally.

Thomas Aquinas^①, combining Aristotle's theory

① "St. Thomas Aquinas, often called by his contemporaries Doctor Angelicus or Doctor Universalis, was, with the possible exception of St. Augustine, the greatest mind of mediæval philosophy. He was born in the Kingdom of Naples of a family of old and noble descent. From early youth he was an ardent scholar in all the leading sciences of his time especially in philosophy, theology, and metaphysics. He became a disciple of the famous scholastic, Albertus Magnus, in Cologne and in Paris. In the year 1244 he entered the order of the Dominicans and remained a chief pillar of this powerful organization. As teacher of philosophy and theology he had an ever-growing fame at Paris, Naples, Rome, and other places. He was continually engaged in the active service of his order and frequently travelled in Europe, for his advice was eagerly demanded both in ecclesiastical and in political matters. Especially the reigning pontiff was very anxious to get his opinion upon every problem of great importance. St. Thomas was canonized in 1323, and not without reason, for no other ecclesiastical thinker has had so deep an influence on the policy of the Catholic Church as this real chief of the scholastic philosophy, who in spite of his early death unfolded a prodigious literary activity." See K.F. Geiser, *Political Philosophy*, p. 90.

of the state with St. Augustine's, defines the state as an institution necessary to a certain indispensable moral life and the highest and most perfect co-operative community that can be attained by man's reason. Where Aristotle calls man a political animal, he says that man is a social animal or a social and political animal. In those days, the Christians, too, adopted such a theory and interpreted the state as the most sinful and gross corporeal community attributable to the outrageous conduct of Satan. This interpretation is a natural sequel to their resistance to the Roman Empire at whose hands they were persecuted, until they regarded the state as an enemy of their faith.

In the eighteenth and the nineteenth century, the New Catholics interpreted the state as a collective body of men originating in a common natural instinct of man. J. A. Altus^① says, in his work, that the state is a general, political, and social body responding to man's needs and based upon a contract, either implicit or expressed. Further he says that the state is a general, living community, bound together by a contract on the one hand and charged on the other with the duty of mutual aid. According to F. H. Giddings^②, the state is at once a natural society animated by congeneric consciousness and a co-operative community aiming at common

^① *Politica methodice digesta et exemplia Sacris et profanis illustrato.*

^② *Principles of Sociology* (1899).

interests. He means to say that coöperation within a natural society means public activities, from which viewpoint, a natural society is the state. Hobhouse interprets the state as one of the various groups of human beings and the largest of them, society excepted. According to him, the state has in it nothing mysterious nor sacred, but is a collective body possessed of a structure and an environment of its own. The rights and duties of the state, he argues, must, like those of any other collective body of individuals, be determined in strict accordance with the relations between its structure and environment.

S. Uesugi, a well-known publicist of Japan, refutes all those theories above cited, which regard the state invariably as a collective body and seeks to explain its essential nature in the fact of coöperation characteristic of a collective body, saying that a collective body does not necessarily possess a common object, nor is it the subject of the will. However, a collective body is not, as he says, a mere aggregate of men, but a social aggregate of human beings having a common object. An aggregate of men having neither a common will nor a common object is nothing but a crowd and not a collective body. For example, people crowding in a street or in a park or in a recreation ground can hardly be called a community, for each one of them has a different object. An aggregate of men is called a community only when it has an object common to all.

In short, the theory of coöperative community

serves to explain logically (a) the relation between state and individual, (b) the relation between the organ of the state and the whole or part of the state, (c) the permanency of the state, (d) the natural growth of the state, its artifical advancement and its smooth reorganization, and (e) the object of the state. Thus we may admit that of all theories of the conception of the state this is the most acceptable.

(4) *The legal person theory.* This theory, often advocated by publicists, is to regard the state as a juridical person, i. e. a legal personality.

The state is originally a community, which has laws and regulations constantly controlling it. It is like a church, a union, a company, etc. controlled by its own laws and regulations, yet it differs from these in respect of the working of its legal control. To be more precise, the state is under the control of force, while churches, unions, companies, etc. are under either ethical and moral control, or, are kept unified with some or other powerful influence in the background. Let us ask: Has the state which exercises such legal control a personality? Can the state be the subject having an object and be like a natural man the possessor of a personality? Grotius^① advocates the legal theory of the state, saying that the state is a perfect community of free men united for the enjoyment of the benefits of law

^① J. W. Garner, *Introduction to Political Science* (1910), p. 39.

and the promotion of common interests. Hobbes^① advocates the theory of fictitious personality saying that the state is an organism, and Pufendorf, dividing rulers into two kinds, personal and substantial, the former being the people and the latter the sovereign, advocates a community theory which regards the state as a spiritual personality. Bluntschli^② advocates the personality theory, saying that the state is masculine and the church is feminine.

Albrecht^③ says that each individual in the state,

① "Thomas Hobbes was born of a very modest family. His father was an illiterate and choleric man who was forced to decamp from his native city in consequence of his irreconcilable temper. It is very probable that the unpleasant reminiscences of his early childhood had something to do with the 'fear complex' of Hobbes which deeply influenced his whole life and philosophical activity. His timid and distrustful mental attitude was developed and strengthened by the whole atmosphere of his long and eventful life. He lived through one of the most stormy periods of English history, the wars of religion and the civil wars, fomented by the religious fanaticism of the period and by the unscrupulous tyranny of the Stuarts. He saw Charles I. executed in Whitehall; he witnessed the sudden change of constitution under Cromwell, the Lord Protector; he saw the kingship re-established; he experienced the extreme insecurity of life and fortune amid the turbulent waves of revolution and counter-revolution."

All these experiences deeply impressed a man who by his temperament and natural inclination stood outside of the practical politics of his day. From his early youth he developed a remarkable faculty for all things of the spirit, especially for poetry, philosophy, and natural sciences. He was still more confirmed in his secluded and aristocratic attitude by the patronage of the Cavendish family, a rich and influential house with some of whose members he later formed a sincere friendship." See K. F. Geiser, *Political Philosophy*, p. 148.

② He is one of the most distinguished writers in German on political science in the 19th century. See *The Theory of the State* (translation of 6th ed.).

③ *Die Sozialen Klassen* (1926), S. 22. See S. Fujii's *The Theory of Politics*, p. 35.

sovereign and people inclusively, possesses two kinds of qualifications. First, the sovereign exercises his power and assumes his duties in the name of the state for the attainment of one common object as head of the state. Secondly, each individual, as an independent man, possesses his rights and assumes his duties for his own sake. In the first instance, no individual has an independent legal personality. If at all, the personality in this case amounts to the state itself. The state rules, acts and has rights; therefore it has a personality. Otto Gierke^① contends that the state is a pyschological personality, which argument comes from a psychological observation of political development. All these scholars give recognition to the legal personality of the state, it being the subject of rights in private law, while in public law it is the subject of state rule. The fundamental principle of the legal person theory of the state lies in the fact that the state and the sovereign, who is an individual, are not regarded in the same light, the former being a personality which is but a subjective concept.

ARTICLE II ABSOLUTISTIC THEORIES OF THE STATE

(1) *The fact theory.* This theory stands on the viewpoint that the existence of the state is only an objective fact just like the existence of plants and trees, mountains, rivers, animals, and so forth in the natural world. Needless to say, the

^① *Political Theories in the Middle Ages*, translated by Maitland (1900).

existence of the state is a fact which we can see with our eyes and understand clearly with our minds, a phenomenon which undeniably exists. But what kind of fact is it? Is it physical or psychological, or both? As to these questions, the fact theory does not give any explanation. Moreover, that part of the theory which regards the state as an objective fact, having nothing whatever to do with the human mind, is misleading in that one thereby can see no difference between the state and society. After all, this theory fails to make clear the nature of the state.

(2) *The condition theory.* This theory argues that the state is a condition. It is supported by various natural law theories and takes various logicizing forms. On its first appearance, it was presented in association with other theories, not as a separate theory. Sometimes it was associated with the theory of power, and sometimes it was incorporated with the theory of the people. In the former instance, the state was regarded as a governing condition, i. e. a condition in which powers are governing, while in the latter, it was regarded as one phase of the life of mankind.

Kant^①, too, supporting this theory, says that the state is a condition in which the people as a whole are related to its component elements. He denounces

^① See Kant's treatise *On the Common Saying*, etc. A good exposition of Kant's views in regard to the nature of the State is given by Paulsen, *Immanuel Kant* (1902), pp. 343-361.

any attempt to reform or reconstruct the state by artificial means as being illegal for the reason that the state is a natural condition.

In short, the condition theory, closely studied, is a variation of the fact theory, dividing the state in its various stages of co-existence and correlation. According to this theory, it is very difficult to account for the unity and constancy of the state, and it is beyond our thought to regard the state as an ultimate unity of those various stages in utter disregard of the existence of human beings. It is a theory explicable only by means of synthetic thinking with which man is endowed. It is inadequate as a theory capable of fully explaining the essential nature of the state, since it ignores man's creative power, which is subjective, by regarding the state only as an objective existence.

(3) *The element theory.* This is a theory which seeks to base its logic upon one or another of the component parts or elements of the state in trying to explain the nature of the state. Now the elements constituting the state are three, viz. territory, people, and sovereignty. Everybody admits the existence of these three and so in studying the essential nature of the state, one of these three is taken to be the most important element, which is, according to this theory, identical with the state. This is the most primitive and crude theory, and was formerly advocated in almost every country. This theory comes under three heads. (a) The

Territory Theory. In ancient Greece and Rome man came first and territory followed in thinking of the state. It was because many of the states in those days were so-called city-states and no importance was attached to the territory; but on the contrary the total number of inhabitants was the foremost question. The term *state*, therefore, is represented by *polis* ($\piόλις$) in Greek and *civitas*^① or *respublica*^② in Latin, each of which stands for people. Thus a collective body of men was regarded as the state and not until medieval times was a territory regarded as the state. It was because, historically, the territorial area gradually came to have an important relation to the strength of the political powers and naturally the city-states, i. e. the people-first states, changed to territorial states, i. e. land-first states. Moreover, with this change of the concept of the state came a change in economic ideas, giving birth to what is called the Agrarian school which attached greater importance to land. Thus it will be seen that this theory is the result of the overestimation of the importance of land. Beyond doubt it is a great fallacy. (b) The People Theory. This theory regards the people as the state

① Grotius defined the state (*civitas*) as a perfect society of free men united for the sake of enjoying the advantages of right and common utility. See *De Jure Belli et Pacis* (1625) Bk. I, Chap. i, Sec. 13 (Whewell's ed., p. 18).

② Grotius's, Vattel's and Wheaton's definitions are drawn from Cicero's definition of the *respublica* as a numerous society united by a common sense of right and a mutual participation in advantages. See *De Republica*, Bk. I, p. 25.

itself. This was, in ancient times, the fundamental idea of the Greeks, but the people are no more the state than numbers of individuals are a nation. In short, the defect of this theory is that it confuses numbers of individuals with a nation. For the state to be a state, the people must be correlated with one another and constitute a permanently indivisible whole. Therefore the people of the state, that is, a nation, is a united entity and not a mere aggregate of individuals. For great numbers of individuals to be called a nation collectively, organization is necessary to unite these individuals into one. A large number of people cannot in themselves be the state. From this point of view, we readily find that neither does this theory fully explain the essential nature of the state since it falls, by such an attempt, into the fallacy of overestimating one of the elements constituting the state.

(c) The Sovereignty Theory. This theory contends that the sovereign power is in itself the state and regards it as the only element of the state. It regards the people and territory as the private property of the sovereign power as well as the object over which the sovereign power is to exercise its influence, that is, to reign. Accordingly, the sovereign power is a real existence, to which the people and territory are subordinate. This theory has special reference to the sovereignty in despotic countries in Europe under the feudal system which developed in medieval times, but it has committed a great error

in that it has regarded sovereignty, the government and the state, as one and the same thing. Originally sovereignty is not a living individual, i. e. a natural man, but simply an abstract idea created by a institution. If sovereignty were a really living natural man, whose life is limited to a certain extent, it must sooner or later cease to exist, and if such sovereignty constituted the state, incessant rise and fall of the state would be inevitable, thus ruining the national life of the people and endangering the permanency of the state. It is not proper, therefore, to regard sovereignty as the state, although it is recognized that sovereignty is one factor of state structure. Territory, people and sovereignty are, as stated above, indeed the three elements of state structure, but it is a great mistake to regard any of them, by itself, the state.

(4) *The natural organic theory.* According to this theory, the state is compared to a living being. Plato, by comparing the state to a giant, made a comparative study of the functions of the state and those of a human being. He maintained that the best organized republican government was a government which had an organization most similar to that of a human body, and further stressed that the state, like various human organs which perform their functions separately, was also divided into various parts, each performing its function separately. This theory aims at explaining the relation between man and the state by a parable, both logical and

physiological, and insists that each individual within the state should be made to belong to the class most suitable to him.

Cicero, too, compared the state to the human body and regarded the head of the state as the spirit governing that body. Later in medieval times, political theories came more and more to regard the organic actions of a human being and those of the state in the same light, and particularly in the Bible we find allegories of this kind, which had a great influence upon scholars in those days.

Hobbes also advocated this theory and pointed out that the state was a leviathan, an imaginative man taller and stronger than a natural man. He saw a close resemblance between the various organs and diseases of the human body and the various organs and defects of a republican government, and regarded the two in the same light. Grotius and Pufendorf, too, based their theories of sovereignty on the idea that the state was an organism or a moral man. Even Rousseau came out with his "naturalistic contrast" and argued that the legislative power was the heart of the state and the administrative power, its brains.

This theory was clearly set forth by German idealists. Kant, opposing the theory that the state was a mere institution established by contract to preserve man's rights, explained the interrelation among the citizens and the relation between the citizens and the state by the principle of organic inter-de-

pendence. He regarded the state as a natural object or an organic unity and each citizen as an inseparable part of the unified whole, not as a separate individual being. He says that in an organism each part always supports the whole and by doing so each part maintains itself. Exactly the same is the case with the relation of the citizens to the state, he says.

The natural organic theory is more noteworthy than the other organic theories in that by adopting the methods and categories of natural science, it has found an essential similarity between the origin, development, structure, and activities of the state and the creation, structure and functions of a natural organism. For example, Zacharia[®] declares that the state, essentially like other organisms, is made up of inanimate matter and a living spirit. Franz, as a result of his natural scientific study of the state, holds that the state takes a natural course in its origin and development, and has essentially the attributes of an organism.

From a certain point of view, Bluntschli may be reckoned among the advocates of this theory. In his *Allgemeine Staatslehre* he calls attention to the life-possessing personal nature of the state and says that the state has the ordinal attributes of a male man, is an organism of a higher order than plants and animals, and is, indirectly, a product of man, being a unity of body and spirit. Further he says

[®] *Vierzig Bücher vom Staate*, Bd. IX.

that the state is an actually living human body achieving both an external growth and an internal development, being a unity of organs closely arranged, each of which has a separate life and function. In his *Lehre vom modernen Staat*,^② he enumerates the general characteristics of the state thus: (a) Numerous personalities combined together, (b) eternal relationship between territory, people and land, (c) unification as a whole, (d) distinction between governing and governed, (e) organic qualities, (f) personality, and (g) the male sex. Of these, he says, the last three are the most noteworthy characteristics. Further he says that the state is a self-supporting living organism having three organic functions, i. e. (a) being a combination of substantial elements and psychological powers, that is, of body and spirit, (b) being constituted of elements each with a special power and quality to sustain the life of the whole, and (c) making eternal growth by developing outward from within.

The different kinds of natural organic theories above cited all agree in recognizing an independent personality or will in the state, comparing it to living things, but, nevertheless, they are all self-contradictory in the assumption that, as is the case with the psycho-organic theory mentioned before, the state is an organism or a living individual. For the interests and activities of individuals, unlike cells

^② *Lehre vom modernen Staat*, Bd. I, S. 1. See S. Fujii's *The Theory of Politics*, p. 105.

in a living organism, cannot be assimilated and absorbed into the life of the state, and the motives of individuals cannot be controlled by the state; moreover their spirits are independent of one another. Besides human beings have each a life and will of his own, and so are altogether different from the parts of a living organism. One defect of the organic theory, therefore, lies in its inability to discover that the will of the state is in no wise similar to the wills of its constituents. Thus in the natural organic theory, which regards the state as a natural organism, we find a defect in the use of too much logical metaphor.

CHAPTER III

THE JAPANESE STATE



HISTORICAL survey of the origin of the Japanese state^① simply overwhelms us with wonder at its great antiquity. The Nihon Shoki^② quotes Jimmu Tenno as declaring the origin to date "as far back as 1,792,470 years and more to the descent on this land of the Heavenly Grandchild." Granting the lapse of about 1,800,000 years between that event and Jimmu Tenno to be a fact, what an incalculable length of lime yet before must have been the time of the Sun Goddess, the Founder of the Imperial Family! One cannot but be deeply impressed with the words of Meiji Tenno when He said in the Imperial Rescript on Education^③: "Our Imperial Ancestors have founded Our Empire on a basis broad and everlasting."

However, reflection here steps in to remind us that the mere length of its history does not constitute the dignity of the state. If, indeed, anybody

^① This means the Empire of Japan.

^② Lit. *Written Chronicles of Japan*. The revision concluded in 720 A. D. by Prince Toneri and Ono Yasumaro from the original called Nihongi, "Chronicles of Japan." The Nihon Shoki consisted originally of thirty-one volumes, but of these, one containing the genealogies of the sovereigns has been lost. It covers the whole of the pre-historic period and that part of the history which extends from the accession of Jimmu Tenno (660 B.C.) to the abdication of Jito Tenno (697 A.D.).

^③ Issued on October 30 in the 23rd year of Meiji (1890).

held the Japanese state in reverence simply on account of its long historical existence, he would be regarding it as nothing but a sort of curio. It is not thus the mere length of its history that impels us to hold the Japanese state in reverence, but it is something more, which must be deeply studied. What is it that has given the state such a long existence? That must first be made clear in order to grasp the essence of the matter. From this standpoint we examine the Japanese state and come first of all upon the undisputed fact that it has had a long unbroken line of Tenno all through the past nearly three thousand years. Countries there are many on the face of the earth, and long, indeed, are some of their histories, but one wonders if there ever was a like instance outside of the Japanese Empire. Take China, our neighbour; its foundation indeed dates back to a very long past, but it has had what is called "Dynastic Revolutions"^①, altogether twenty-four dynasties having so far risen

^① Jap. *Ekisei Kakumei* (易姓革命), usually translated by Occidentals as Changes of Dynasties. *Ekisei* means "change of family name." In old China the sovereign power was succeeded to by any person who was considered as the most virtuous and was so ordained by Heaven, and not by any descendant of the preceding sovereign by virtue of blood relationship. It was succeeded to by a sage of the time not connected with the predecessor by blood. Thus by abdication always came a change of dynasties, one with a family name different from that of the predecessor succeeding. Abdication at once meant change of family names. *Kakumei* means "Accepting Heaven's command afresh." A sovereign was a virtuous man ordained by Heaven to rule over the land in the name of Heaven, and when he lost his virtues, Heaven chose some one else as sovereign, which was *Kakumei*, i. e. "revolution by Heaven's will."

and fallen. Take again Egypt, Babylon, and Assyria, then Greece and Rome; what are they now but mere names in history, their glories having passed never to return? Then we turn to modern European states such as Spain, Portugal, France, Austria, England, Denmark, Sweden, Norway, and so on; and we see that none of them has a history behind it extending over any more than a thousand years. Switzerland, Holland, and Belgium are still younger, As to Italy and Germany, their foundation dates back no more than seventy short years, and in neither of them has there ever been an unbroken line of sovereigns as in the Japanese state. Further, in China, France, and Germany the monarchical government is now a thing of the long past. The United States of America and the countries of Central and South America have all been without sovereigns from the very beginning of their existence.

Taking all these countries for comparison, the fact that the Japanese state has always been ruled over by an ever-unbroken line of Tenno brings home to us the unique significance which it necessarily carries, quite distinct from instances observable in all other countries. Indeed by virtue of such a circumstance does the dignity of our national structure shine resplendent over all the world. In this very unbroken dynasty of Tenno do we see the spirit of the country's foundation most solemnly revealed. Now let us ask: What is there yet beyond that is the cause of all this splendour? In other words:

What is the foundation upon which all this continuity of history and of Tenno is built up? Only by digging deep down into the very foundation can the essential nature of our national polity be firmly grasped.

A deep insight into the question leads us to the conviction that the everlasting existence of the Japanese state, particularly that remarkable fact apparently incidental to it, viz. the Imperial dynasty ever unbroken in lineage, is the veritable crystallization of the great spirit reinforcing the foundation of the country. This spirit is fully embodied in the words of the Sun Goddess, the Imperial Ancestress, who on the occasion of the descent on this land of the Heavenly Grandchild said: "Midzuho-no-Kuni (The Country of Goodly Grain) with the promise of one thousand five hundred mellow autumns to come is the land over which Our descendants shall become Sovereigns. You, Our descendants, come and govern it. Come! The prosperity of the Imperial Throne shall be coeval with heaven and earth." These words form an absolute declaration, clear as noon-day through all ages and pervading through all the Universe. It is this divine message of the Sun Goddess that not only the succeeding Tenno but also His subjects have, one and all, looked up to even to this day as the very spirit of the country. It is on the foundation of this oracle that the Tenno and the people have ever continued to guard and strengthen both the Imperial Throne and the Empire.

By the divine utterance, "coeval with heaven and earth," was promised once for all—responded to by reverential thanksgiving—the everlasting existence of the Imperial Throne and the Empire.

In the divine words, "the land over which Our descendants shall be Sovereigns," is revealed a solemn declaration that the Japanese state is the land of the Imperial Family of descendants of the Sun Goddess, that no change of dynasties shall ever take place, as in our neighbour China, and that no struggle for possession of the Sovereign power shall ever take place, as in European countries. The Sun Goddess also said: "The grain raised in the Altar-Garden^① in Takama-ga-Hara, where We reign, shall be given to Our descendants," which is but to solemnly forbid anyone not of divine origin to reign over and govern the land.

With these words, the Sun Goddess, Herself handed to the Heavenly Grandchild, Ninigi-no-Mikoto, the Three Sacred Objects^②—the Yata-no-

^① Jap. *Iminiwa*, the place of worship.

^② Usually called the Three Sacred Treasures, *Sanshu-no-Shinki*. The Imperial Insignia consisting of a mirror, a string of curved gems, and a sword handed to Ninigi-no-Mikoto, grandchild of Tensho Daijin, i.e. the Sun Goddess, on the occasion of the former's descent on the islands of Japan which are styled in dignified Japanese, "The Country of Goodly Grain of Toyo-Ashihara with the promise of One Thousand Five Hundred Autumns to come," when the Sun Goddess ordained thus: "This Land of Goodly Grain of Toyo-Ashihara is the country where Our Descendants shall be Sovereigns. Ye, Our descendants, come and govern it. The prosperity of the Throne shall be coeval with Heaven and Earth." These treasures have been handed down from Tenno to Tenno even to this day.

Kagami^①, the Yasakani-no-Magatama^② and the Ame-

① *yata* or *ya-ata*, "eight palm-lengths," indicating the circumference of the mirror, which is most popularly believed to be round in shape, and of nickel or, by some, of bronze. *Yata* or *ya-ata* is held by some to mean "eight heads," indicating the diamond shape, while by others "eight ends," indicating the existence of many lines and circles on the back of the mirror. (a) According to Japanese mythology, the mirror was forged by the Goddess Ishikori-dome of iron obtained from the "mines of heaven" when the "eight hundred myriads" of *Kami*, i. e. gods, assembled in Ame-no-Yasukawara, i.e. the bed of the "Tranquil River" (the Milky Way) in order to discuss the means of enticing the Sun Goddess from her retirement in a cave, where at the entrance she had placed a rock, causing darkness to fall upon the "plain of high heaven" and upon the islands of Japan. (b) When this mirror was handed to Ninigi, the Sun Goddess instructed the former in these words: "Thou shalt regard this mirror as thou regardest me." The successive Tenno came to regard and reverence it as though it were the spirit of the Sun Goddess, and lived in the same room where it was installed. (c) During the reign of Sujin Tenno (97-30 B.C.) a feeling of awe began to pervade the rites of worship more strongly than a sense of family affection, and the idea of living and worshipping in the same palace assumed a character of sacrilege. There was the need of greater purity; accordingly a replica of the sacred mirror was manufactured, which, together with an imitation of the sacred sword and the sacred string of gems, was kept in the palace, the original mirror and sword being transferred to Kasanui-no-Mura (the village of Kasanui) in Yamato Province, where a shrine for the worship of the Sun Goddess had been built. Later during the reign of Suinin Tenno (29 B.C.-70 A.D.) these originals were transferred to the National Shrine in Ise Province to be enshrined as the spirit of the Sun Goddess. (d) As time passed the Three Sacred Treasures became symbolic of wisdom, benevolence, and valor in order of the mirror, the gems, and the sword.

② A five-hundred beaded string of curved gems made by the God Tama-no-Oya when the Sun Goddess was in retirement in the cave as mentioned before. Even after the transference of the sacred mirror and sword to Yamato, as before stated, the original gems were kept in the sanctuary in the palace together with the replica respectively of the mirror and of the sword. As time passed the gems became symbolic of benevolence.

no-Murakumo-no-Tsurugi^①—, whereupon Ninigi-no-Mikoto descended on the peak of Takachiho located at a place called So^② in what is now the Province of Hyuga^③, and forthwith set about to rule over the land. In so doing he was true to the divine words of the Sun Goddess, who had said: “Thou, Our descendant, shalt regard this Sacred Mirror just as thou wouldest regard Us before thine eyes and shalt share the same raised floor in thine palace whereon it shall rest, thus to reflect thyself upon.” He indeed

^① *Ame*, “heaven”; *murakumo*, “banks of clouds”; *tsurugi*, “sword.” (a) The sword which Susanoo-no-Mikoto, younger brother to the Sun Goddess, found in the tail of the Yamata-no-Orochi, or eight-headed monster serpent, spreading over hills and dales and having pine forests growing on its back, when he killed it at a spot on the River Hi in Idzumo Province and which God Susanoo presented to the Sun Goddess. (b) The sword is so called because of the long banks of clouds drifting in the heavens when the God Susanoo killed the serpent. (c) The sword is also called *Kusanagi-no-Tsurugi*. *Kusa*, “grass”; *nagi*, “to mow down.” The legend is that when Prince Yamatodake, son of Keiko Tenno (71-130 A.D.) was setting out on his expedition against the Yemishi, identified by some with the modern Ainu, in the East, he prefaced his campaign by worshipping at the Shrine of Ise, where he received the sword from his aunt Yamato-hime-no-Mikoto (Princess Yamato-hime). Thence he sailed along the coast of Suruga, where he landed, and was nearly destroyed by the burning of a moor into which he had been persuaded to penetrate in search of game, but he escaped with difficulty by mowing down the burning grass with his sword and causing the fire to drift enemyward. (d) Later the sword was enshrined in the Atsuta Jingu (shrine) in Owari Province. The imitation of it is now enshrined in the Imperial palace. (e) This sword is held in great reverence as symbolizing the virtue of valor.

^② Pronounced simply *so* a place name.

^③ The name of a geographical division of present-day Kyushu. Its name in administration is Miyazaki Prefecture.

looked up to the Yata-no-Kagami as the embodiment of the spirit of the Sun goddess and lived with it as his daily companion. By so doing he could feel as if he were in the very presence of the Sun Goddess Herself, and, with the divine will always in sight, ruled over the land with benevolence toward the people. It is for this very reason that the successive Tenno of Japan have each in his succession inherited the Three Sacred Objects as the unmistakable evidence of the holder of the Imperial Throne so that they might feel inwardly as if the Imperial Ancestors themselves were constantly with them to look after their administration of state affairs.

Regarding this, the Japanese Constitution provides in Article I thus: "The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal." Of course by this provision it is not meant in the least that such an eternal line of Tenno has for the first time been established in this country. Far from it, it is intended simply to confirm more strongly than ever that such is the immutable ideal—the great spirit—underlying the foundation of the country and that there shall be no change whatever in the faith of the people in the undisputed fact even to all eternity. As to the fact that the Imperial Throne has been, and shall be, bequeathed to the descendants of the Sun Goddess, together with the Three Sacred Treasures in evidence thereof, the Imperial House Law provides in Article I thus: "The Imperial Throne of

Japan shall be succeeded to by male descendants in the male line of Imperial Ancestors." Further in Article X thus: "Upon the demise of the Tenno, the Imperial heir shall ascend the Throne, and shall acquire the Divine Treasures of the Imperial Ancestors." These provisions, again, do not set forth anything new. It is a mere confirmation of what has been the rule since the remote past. Further reference may be made to the words from the Oath of Meiji Tenno (明治天皇) offered to the spirits of the Founder of the House and other Imperial Ancestors on the occasion of the promulgation of the Japanese Constitution, which are: "...in pursuance of a great policy coextensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government." Further still: "We hereby establish the Imperial House Law and the Constitution. These laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors."

As may be seen from the above, the great spirit of the foundation of the Empire is in itself suggestive of the everlasting prosperity of the Imperial Throne. It is only by tracing deep down to this point that one can account for the glorious national polity held in such reverence. If a mere long history of national existence or a simply long unbroken line of rulers is to be sought for, Ethiopia furnishes us with an instance. However, the fact that the

great spirit revealed in our long national existence and in the long unbroken line of our Tenno has been handed down unchanged and unimpaired from generation to generation as the very Way of the Sun Goddess and that this same spirit has always inspired the successive Tenno with the consciousness of their divine origin, is well revealed in the words of Meiji Tenno in the Imperial Rescript on Education: "Our Imperial Ancestors have deeply and firmly implanted virtue." This fact, indeed, convinces one of the intrinsic superiority of our national polity over all others. What can be the right descriptive terms for such a form of government? Some may term it *Tokuchi-Shugi* (德治主義), meaning government by virtues; others, *Ōdo-seiji* (王道政治), meaning rule with justice; we would rather call it *Kōdō-seiji* (皇道政治), by which term we mean government according to the way of the Tenno, or simply the way of the Tenno.

In this way of the Tenno is found innate the sacredness of the Tenno, whom his subjects look up to in adoration as divine Sovereign. Their faith is that the Tenno, being a descendant of the Sun Goddess, is a living god—a man-god—and that therefore he practises the way of the Tenno, i. e. the Way of the Sun Goddess. Such a Tenno is indeed sacred, if ever there was anyone sacred. The Japanese Constitution has in Article III: "The Tenno is sacred and inviolable." This certainly points out, as in the Western fashion, the great principles of

the inviolability of the sovereign power and the non-responsibility of the sovereign, but further than that, it confirms more strongly than ever the immutable fact of the sacredness of the Tenno for the reason already dwelt upon. It is common knowledge of the Japanese people and therefore needs no special emphasis that such a quality of the Tenno is on one hand one of the great principles of the foundation of the country, and on the other a faith inextricably rooted and endearingly cherished in the people's minds.

The inviolability of the Tenno is not only clearly revealed in the historical fact of government by one unbroken line of Tenno, but is also testified to by many other evidences in history. It is further endorsed by the fact that the Imperial Family has no family name of its own. In our neighbour China, one hears of the historical term *Ekisei Kakumi*, to which reference has been made elsewhere. As the term suggests, all the rulers had their family names from the ancient time of the Three Augustus^① and the Five Rulers^② down to the time of the Aisin Gioro^③.

^① Chinese *San Huang*: *san* being "three" and *huang* "emperor." Six theories are presented about the Three Augustus, the most widely accepted of which names the emperors in order thus: (1) Sui-jön (燧人) (?-2853 B.C.), (2) Fu-hi (伏羲) (2852-2738 B.C.) (3) Shön-nung (神農) (2737-2705 B.C.)

^② Chinese *Wu Ti*: *wu* being "five" and *ti* "ruler." Three views exist. According to the Shiki, (1) Huang-Ti (黃帝) (2704-2597 B.C.), (2) Chuan-hü (顓頊) (2510-2433 B.C.), (3) Ti-k'u (帝嚳) (2432-2363 B.C.), (4) Yau (堯) (2357-2258 B.C.) (5) Shun (舜) (2258-2205 B.C.)

^③ The name of a Manchu tribe, whose chief was Nurhachu in 1616.

of whose extraction was Nurhachu, the founder of the modern Shin dynasty^①. In Europe, France had her Bourbons, Russia her Romanoffs, Germany her Hohenzollerns, and Austria her Hapsburgs, all having been overthrown to give place to forms of government other than monarchy. Present-day England has her Hanovers, and in other countries, whether in Italy or in Portugal or wherever else, all royal families had, or have, their family names. How is it that the Imperial Family of Japan alone has no such name? The answer comes necessarily from the fact that whereas in other countries most rulers have sprung up from among those under their preceding rulers by seizing the sovereign power, in Japan the divine descendants of the Sun Goddess, i.e. living gods, have each in his succession ruled over the country from the first, ever revered as inviolably sacred Tenno. To state this in another way, no Tenno has ever been in the status of subject before his accession, and no one except of divine origin has ever been allowed to ascend the Imperial Throne.

Now we turn to the great spirit of the unity of Sovereign and subject, together with the facts which bear testimony to it. This spirit, this great ideal, of one Sovereign above all his subjects has been

^① Nurhachu unified all Manchu tribes in 1616 and called his dominion by the name Aisin (愛親覺羅), which was the name of the tribe he himself belonged. Later he named his country Shin and by degrees made invasions into the country Ming. In 1664 A. D. he made Peking the capital land his rule extended over the centre of China.

realized solely by the latter's heartfelt gratitude for their Tenno's august virtues, as may be seen in their unstinted support of the prosperity of the Imperial Throne and also in their whole-hearted efforts to place the glorious structure of the Empire on a basis firm and sound above all comparison and immutable for all ages. All this is but natural, since, in Japan, as already reiterated, the successive Tenno, who are the divine descendants of the Sun Goddess, the Founder, and therefore living gods, have each without interruption succeeded to the sacred and inviolable Imperial Throne, and have exercised bountiful benevolence over the people through all ages in their ever-illustrious rule over the land, i. e. the way of the Tenno.

It is to be noted here that the great spirit of such unity of Sovereign and subject has been handed down among the people from generation to generation and has evinced itself in a profusion of glory through all ages. As the forefathers of the Japanese have done in the past, just as much are their descendants doing for their present Tenno and the country. Succeeding thus to the way of the forefathers is a manifestation of filial piety toward them on one hand and of loyalty to the Imperial Family and the country on the other. In such firm unity of the two qualities, inseparable in any calamity and unspoiled in prosperity, is seen an admirable side of Japanese life, unmatched, unparalleled, unchallenged in the whole world.

It may be further noted that the Tenno, being of divine origin, is Himself naturally led to revere His divine Ancestors. No wonder that, within the Imperial Family, reverence for the Imperial Ancestors means piety to the gods, which, reversed, is again reverence for the Imperial Ancestors. Such a sentiment is not limited to the Imperial Family, but among the people, too, reverence for their ancestors means piety to the gods, which, reversed, is again reverence for their own ancestors; for inasmuch as the people are themselves of the same Yamato race as the august Tenno—a descendant of the same family as His ancestor-gods—, the first Imperial Ancestor is to the people none other than their own ancestor-god—the veritable Founder of the Grand National Family.

In such unity of worship of the gods and worship of the ancestors and in the identity of the first Imperial Ancestor with the people's first ancestor-god, i.e. the Founder of the Grand National Family lies the basis of the unity of Sovereign and subject. Herein, too, originates the unity of loyalty and filial piety.

All that has been said thus far will go a long way toward elucidating the essential character of the Japanese state. It indeed has been held as the great spirit of the foundation of the Empire and has served as the sole guidance to the successive Tenno and Their subjects. To sum up: (a) The foundation of the Empire in a remote past beyond all memory and all calculation. (a) The independence

and development of the Empire, (b) the inviolability of the land. (b) The coevality of the Imperial Throne with heaven and earth. (a) The divine words of the Sun Goddess, (b) the ever-unbroken line of Tenno, (c) succession to the Three Sacred Treasures. (c) The sacredness and inviolability of the Tenno. (a) The way of the Tenno, (b) the living god. (d) The unity of Tenno and subject. (a) Loyalty and filial piety combined in one, (b) one Tenno over all, (c) the people's willingness to serve the Tenno. (e) Worship of the gods and of the ancestors. (a) The divine origin of the first Tenno, (b) the Grand National Family and its branches.

The above enumeration comes to the single term The Grand Way of the Gods. For, indeed, the Tenno is a living god descended from the Sun Goddess, and in pursuance of the grand Imperial policy coeval with heaven and earth, in obedience to the Sun Goddess' benevolent wishes, and in conformity to the precepts left by His predecessors, does He reign over and govern the country. The people, too, are never weary of serving their sacred Tenno in whole-hearted support of the Imperial Throne and in their efforts to develop the country, thus to make themselves examples to their posterity. Their loyalty, bravery, patriotism, self-sacrifice—these, indeed, have made the country what it is to-day. Within the Japanese state, where the grand Way of the Tenno reigns supreme, this fact, which to a cosmopolite may sound fictitious or otherwise in-

credible or as a mere form of national pride, has had its existence clear as noonday and solid as adamant, ever since time immemorial, and will last to the end of time.

CHAPTER IV

THE CONSTITUTION OF THE STATE

SECTION I NATIONAL STRUCTURE

WHEN we speak of the state, we do so in reference to the manner in which that state is made up. For the state to stand as such, it requires three component elements, i.e. the supreme or sovereign power, a certain number of people constituting it, and a territory. To be more precise, for a large number of individuals to be solidly organized into a community, i.e. to be formally recognized as the collective people of the state and for a certain area of land to be established as its territory, the existence of the supreme or sovereign power is the indispensable prerequisite. In other words, no state with its people can ever exist where there is no established supreme or sovereign power. Thus it will be seen that organization of the state is nothing but determination of who is to be the holder of the supreme or sovereign power. Whatever the government and local administrative systems may be, these cannot in themselves constitute the characteristic of the country, but the question "Who is the holder of the supreme or sovereign power?" i. e. "How is the Head of the Empire, (the chief

of the state)[®] or the highest authority of the state, constituted?" is the key to the right understanding of the nature of the state.

In the monarchical structure, the sovereign consists of only one natural person, while in the republican structure, there are several persons holding sovereignty. The monarchical structure, combined with the constitutional system, is much the same as the absolute monarchical structure in that the sovereign himself is the only holder of the ruling power since he himself sees to the affairs of the state, the difference being that, in the former case, Parliament prevents the despotism of the ruler by the participation of the people in state administration, and not in the latter case. The republican structure, whose highest authority is held by several persons, is based upon the activity of the people, direct and indirect. According to my understanding of the subject, the monarchical and the republican structure may be classified as follows:

Monarchical Structure (a) Genuine Monarchy and
(b) Quasi-Monarchy.

Republican Structure (a) Popular Republic and
(b) Class Republic.

[®] The King of England is the chief officer of the state. He is an essential element of the legislature. Justice is administered in his name; and, therefore, he can not be proceeded against by his own Courts. The executive government of the country is carried on in his name and on his behalf, but what were formerly the personal prerogatives of the sovereign have now become so largely the privileges of the executive that they can only be dealt with collectively as prerogatives of the Crown.

Popular Republic (a) Direct Republic and (b) Representative Republic.

Of these two, the latter, when the referendum is adopted, is considered as but a variety of the direct republican structure. The class republican structure is also subdivided into two thus:

Class Republic (a) Aristocratic Republic and (b) Working Class Republic.

The above stated differences between the various national structures refer only to the question of the holder of the ruling power—the Head of the State or the highest authority. They are not differences in the names of states, whether or not there is an emperor or a king. Take England as an example: it has a king, indeed, but the sovereignty is in the hands of the people i.e. their representatives in Parliament, the king being invariably elected by Parliament, and is therefore a democratic country. During the reign of the Stuarts in the beginning of the seventeenth century, the despotism of the king reached a climax, which culminated in the decapitation of the king in 1649^①, a new country emerging later as a

^① The House of Commons was brought completely under the control of those most bitterly hostile to the king, whom they immediately proposed to bring to trial. They declared that the House of Commons, since it was chosen by the people, was supreme in England and the source of all just power, and that consequently neither king nor House of Lords was necessary. The mutilated House of Commons appointed a special High Court of Justice made up of Charles's sternest opponents, who alone would consent to sit in judgment on him. They passed sentence upon him, and on January 30, 1649, Charles was beheaded in front of his palace of White-

republic. This republican system had lasted only eleven years, when the Restoration came. This time, however, the king held the throne merely in name, and so the country was in reality a democratic one with a king. Thenceforward English Parliament changed kings at its own will and finally deprived the kingship of all powers. It may be noted that when Parliament was about to make William III., Prince of Orange^①, king, it took the trouble to enumerate cases of abuse of the despotic power by the former king, and decided upon a demand to be made to the king-elect for recovery of rights and liberties believed to have been violated by the former

hall, London. It must be clear from the above account that it was not the nation at large which demanded Charles's death, but a very small group of extremists who claimed to be the representatives of the nation. See James Harvey Robinson & Charles A. Beard, *Outlines of European History*, Part II (1919), p. 43.

① Mary, James's daughter by his first wife, had married her cousin, William III., Prince of Orange, the head of the United Netherlands. The nation might have tolerated James so long as they could look forward to the accession of his Protestant daughter. But when a son was born to his Catholic second wife, and James showed unmistakably his purpose of favoring the Catholics, messengers were dispatched by a group of Protestants to William of Orange, asking him to come and rule over them. William landed in November, 1688, and marched upon London, where he received general support from all the English Protestants, regardless of party. James II. started to oppose William, but his army refused to fight and his courtiers deserted him. William was glad to forward James's flight to France, as he would hardly have known what to do with him had James insisted on remaining in the country. A convention, made up of members of Parliament and some prominent citizens, declared the throne vacant, on the ground that King James II., "by the advice of the Jesuits and other wicked persons, having violated the fundamental laws and withdrawn himself out of the kingdom, had abdicated the government. Ibid. pp. 52-53.

king, and not until he had sworn to grant the demand, which was called The Declaration of Rights^①, was he proclaimed king in Parliament. Thus Parliament effected the deprivation of the king of all his political powers and made itself the centre of government, which fact established the existence of a democratic country with a king who reigns, but does not rule.^②

As may be seen from the foregoing, the national structure of a country is established on the basis

^① In the Declaration of Rights, the final resolution to which both Houses came on February 13, it was determined "That William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and dignity of the said Kingdoms and dominions to them the said Prince and Princess, during their lives and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess during their joint lives; and after their decease the said Crown and royal dignity of the said Kingdoms and dominions to be to the heirs of the body of the said Princess; for default of such issue, to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, the heirs of the body of the said Prince of Orange." See Taswell-Langmead, *English Constitutional History* (1911), p. 178.

The Declaration of Rights was accordingly drawn up. It contains: (1) a recital of all the illegal and arbitrary acts committed by James II., of his abdication, and of the consequent vacancy of the throne; (2) an emphatic assertion, nearly following the words of the previous recital, that all such enumerated acts are illegal; and (3) a resolution that the Crown should be settled on William and Mary for their joint and separate lives, but with the administration of the government, during their joint lives, in William alone; and after the decease of the survivor, on the descendants of Mary, then on Anne and her issue, and lastly on the issue of William. On February 13, 1688-1689, a tender of the crown, on the conditions set forth in the Declaration, was made by the Marquis of Halifax in the name of all the Estates of the Realm. *Ibid.*, p. 520.

^② Le roi régne et ne gouverne pas.

of the history of its foundation, and solely on that account can never be changed for any reason whatever. However, the method of exercising the sovereign power may depend upon its merits and demerits. It is also to be noted that the national structure of a country comes to an end with the end of that country. Therefore a change in the national structure of the state at once means the extinction of that state, in most cases giving rise to a new state. The method of government, however, is susceptible to change, dependent on the time and place so as to ensure success in government. This method or system of government, contrived so as to best meet the needs of the time, is usually called a form of government.

SECTION II FORM OF GOVERNMENT[®]

A form of government is thus susceptible to change according to the time and place, which fact is in itself its own characteristic as distinguished from the national structure. A form of government is said to be autocratic when the holder of the sovereign power is subject to no legal restrictions in actually exercising the power, whether in law-making or in imposing on the people whatever burden he chooses. It is said to be constitutional when the extent of the exercise of the sovereign power is restricted by the legislation of a constitution, thus providing a means to prevent despotism. It is true

[®] Die Regierungsformen.

that there is no disorder even in the case of a despotic form of government; far from it, there are surely many laws and various social institutions, but the holder of the sovereign power is free to make changes in or to abolish any or all of them at his own discretion and at any moment. He may thus be said to carry on a sort of unrestricted government. On the contrary, in the constitutional form of government, state control is divided among several institutions, each of which has its own rights and any action of each institution is justified within its rights, freedom of action being granted to the people at the same time. It may be noted that the guarantee of the people's rights, which was first provided in the first constitution of France, following the French Revolution in 1791, and which is called the Declaration of the Rights of Man^① is now-a-days

^① The Declaration reads: "Men are born and remain equal in rights. Social distinctions can only be founded upon the general good." "Law is the expression of the general will. Every citizen has a right to participate, personally or through his representative, in its formation. It must be the same for all." "No one shall be disquieted on account of his opinions, including his religious views, provided that their manifestation does not disturb the public order established by law." "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, being responsible, however, for such abuses of this freedom as shall be defined by law." "All citizens have a right to decide, either personally or by their representative, as to the necessity of the contribution to the public treasury, to grant this freely, to know to what uses it is put, and to fix the proper method of assessment and of collection, and the duration of the taxes." "Society has the right to require of every public agent an account of his administration." Well might the Assembly claim, in its address to the people, that "the rights of man had been misconceived and insulted for centu-

included in the constitutions of all countries alike and considered one of their essential elements, without which, it is claimed, they cannot be recognized as constitutions. The above-mentioned Declaration, issued in 1789, said in effect that the object of the constitution was to establish the guarantee of liberty and of the separate independence of powers, without providing which no state was worthy of the name. Since that time, the form of government conforming to this essential point has been called constitutional, and now when we speak of a constitution, we mean such a one only as by proper provisions thereof establishes the constitutional form of government. Naturally, a constitution in this sense is a characteristic asset of a constitutional country. Of course it matters not whether the constitution we speak of is made out in written form or not.

The above political principle adopted by the French Revolution has had a great influence upon the constitutions of other countries, the result being that now the guarantee of the liberty of the individual and of private property is made the sole object of every constitution and that the machinery of the state comprises the three powers, viz. legislative, executive, and judicial. It may be added that Montesquieu's theory known as the *séparation des pouvoirs*, had the greatest effect upon the French Revolution.

ries," and boast that they were "re-established for all humanity in this declaration, which shall serve as an everlasting war cry against oppressors."

Montesquieu divided the working of the supreme power into three, viz. the laying down of a strict line of demarcation between the Legislature, the Executive, and the Judicature, each of which he held, should be handled by a separate agent, the reason being that whoever has power is liable in the course of time to abuse that power in utter disregard of his original intentions and becomes high-handed in all his dealings. In order to prevent such an unfortunate inevitability, the three powers, he held, should be kept independent of one another, thus pitting them against one another so as to bring about equilibrium and moderation among the three. This political principle, combined with others advocated by modern states, has given rise to various forms of government according to the prevailing circumstances, the national structure, and the current of the times. For example, the United States, following the doctrine of Montesquieu, observes now-a-days the principle of *séparation des pouvoirs* by its Legislature, Judicature, and Executive. In England and France, too this principle is strictly adhered to, although, consciously or not, the executive is in either country under the supervision of the legislature. In Japan, the same is adopted under the sovereign power of the Tenno.

PART II

THE CONSTITUTIONAL LAWS^①

CHAPTER V

A GENERAL CONCEPTION OF THE CONSTITUTION

SECTION I LAW

AW is a regulation or a rule showing what ought to be with regard to the will of the people or of a regal person. Law tells "what ought to be" and is abstract and formal, being quite independent of fact. As a matter of form, law finds expression in order and prohibition, being a conscious institution combining condition with consequence by "Must" and "Must not."

① Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. Hence it includes among other things all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election. These rules also deal with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the state extends and settle who are to be deemed subjects or citizens. Observe the use of the word "rules," not "laws." This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. See A. V. Dicey, *Law of the Constitution* (1915), pp. 22-23.

Man's will is made up of various causes. For instance, we may be prompted to do something by our feeling of pleasure or displeasure; or we may try to attain some object and gain profit from some moral motive or according to a habit, and so on; but in any case the decision of our will is subject to countless causes influenced by various laws, religious, ethical, logical, and social. When a large number of people combine into a community, the will of the community conceived by each individual also varies according to different causes, but these different conceptions ought to merge into one after all, since they all spring from human nature. Accordingly, law aims at controlling man's will only, with no thought whatever of cause, motive, object, and interests. Thus law sets up a standard for men to follow in the form of order and prohibition, that is, by saying "Must" and "Must not," but morals likewise show men what is good by means of conduct regulated by the forms "Should" and "Should not." Then what is the difference between law and morals? The former is heteronomous and is a standard of conduct acknowledged by the state, while the latter is autonomous and is a standard of conduct in social life. Indeed the two concur in that, as above stated, they vary according to the time and place, but morals always precede law and law develops, as a rule, by following morals. Besides law is a standard of outward conduct, while morals are one of the inward states of mind. What, then, are the relation between law and the state?

As already stated, a mere aggregate of men does not constitute a community. A community has an object common to all its members and an organized form, while a mere aggregate of men has not. It is law that gives a community, such as a state, an organized form and a definite object, and makes it take a definite action. Law is "Ought to be" and "Must do thus." Law alone says "Must" and gives to men with various objects in different environments a definite order and a definite object, and leads them in a definite direction. This is the reason why law has a binding force. Law gives order to an agglomeration of men and makes it an organized community.

To be more minute, law solves the problem: What must be done or must not be done to make a large number of individuals with different objects and in different surroundings act as one body, that is, what must be done to make the activity of each individual's will lead toward a definite goal? Law shows a standard for each individual to follow, restricts and compels his conduct and non-conduct, and makes his single self behave like a whole. Considered as a whole, it is by systematic organization that a large number of individuals combine into a unified whole; and from this viewpoint we should declare emphatically "No law, no form."

Law unites a large number of different individuals into one body, i.e. the state. Law makes the state a well controlled community by harmonizing the different wills of different individuals. If law loses

this function, it ceases to be law. Law, which is so necessary to the state, must have universality and adaptability, with the general will of the people ever in sight. Once law loses such qualities, it loses the force of law. Therefore just law is invariably in accord with the general will, unites different individuals into one body, and gives birth to a well-organized community. Law is thus a standard by which individuals are united into one body. It is a universal and appropriate will, at one with the state, and not the separate wills of individuals.

Law has not, however, anything fixed and immutable in it; it changes with the advancement of civilization both in scope and application. Law is essential to the state, no matter whether it is made by the people or by a special individual. It is enough for law to give a community an organized form.

Now let us pass on to the operating force of law toward the state. Law in the state has a far greater binding force than that in other communities. Now, then, why is it that law in the state has such a superior binding force? It is all because it has a unified will. By a unified will is meant that will of a community to decide upon law, that is, that will to bind the wills of individuals, make them one, and thus to endeavour to produce a consistent one-system order with the ultimate object of uniting into one body a large number of different individuals. This unified will, therefore, has the highest and the mightiest power within a community and is called in the case

of the state sovereignty or the sovereign power. Solely on account of this sovereignty has law in the state a far greater operating force than regulations in other communities. It is due to the function of sovereignty that law, as such, gives the state organized form and order.

SECTION II STATE MACHINERY

According to popular conception, a constitution is the fundamental law of the state, i.e. a law which provides a fundamental standard whereby the state is to be guided. It is the fundamental law of control to unite and hold together human beings that lead social lives in a portional society called state. As to what particulars a constitution should contain, opinion is divided among students of constitutions. Austin regarded a constitution as a law to determine merely the working of the supreme power of the state, saying that it is an administrative law which determines the functions of that power. He observed carefully sovereignty, which is the supreme power of the state, in its static condition and gave the name of constitution to such regulations only as established its essence, and as to those regulations concerning the functions of the sovereign power on its dynamic side, he included them in the category of administrative law.

A constitution, ought, however, to include in it provisions concerning not only the fundamental machinery of the state but its functions, or else it would

be imperfect as the fundamental law of the state. On this point A. V. Dicey goes a step farther and argues (a) that provisions for the different actions of the supreme power of the state and their mutual relation i.e. those concerning regulations by the supreme power, and (b) provisions for the means whereby the supreme power of the state or its machinery exercises that power i. e. those concerning the functions of the supreme power,—these as a whole should be regarded as a constitution. He shows by many examples that a constitution is a set of provisions for succession to the Crown, the sovereign power of the King, the form of the legislature, the method of election of its members, the responsibilities, rights and powers of Ministers of State, the extent of territory, the requirements of the people etc.^①

^① Constitutional law comprises that part of a country's laws which relates to the following topics, amongst others:—The mode of electing the chief magistrate of the State, whether he be emperor, king, or president: his powers and prerogatives. The constitution of the legislative body: its powers and the privileges of its members; if there be two chambers, their relations *inter se*. The status of ministers and the position of the civil service which acts under them. The armed forces of the State and the liability of the citizen to be called on to serve in the army or navy. The relations of Church and State, if these be formally recognised. The relations between the central Government and local bodies to whom subordinate functions of government are delegated. The relations between the mother country and its colonies or dependencies. The treaty-making powers, and the rules which regulate intercourse with other States. The persons who constitute the body of citizens, the terms on which foreigners may be admitted to its territories and the privileges which they are permitted to enjoy; the mode in which taxation may be raised and the revenues of the State may be expended. The constitution of the Courts of justice and the tenure and immunities of the Judges. The right to demand a jury where trial by

In short, it is proper to take it for granted that a constitution in its original conception partakes of the nature of law determining state structure and of law determining the fundamental principles underlying the behaviour of sovereignty, i.e. law of the form of government. So far as the method of instituting sovereignty is concerned, it gives precision to various legal aspects of sovereignty, thereby determining what is now called domestic law, and at the same time determines the legal relation among states, which is international law. A constitution, in this sense, is a law which is the foundation of all other laws. Every country has its own constitution of this kind, for simultaneously with the foundation of the state is issued a law for establishing that fact, i.e. a national law, and exactly at the same time is established, too, some principle of government in the form of a law.

In recent times, however, the term constitution has come to bear a different meaning. Since the *Declaration des droits de l'homme* of 1789, in which it was declared that a constitution provided for the guarantee of freedom and the separate independence of powers and that no state without such provisions was to be properly called one with a constitution, all countries having a constitution with such provisions have

jury exists; the limits of personal liberty, free speech, and the right of public meeting or association; the rights of the citizen to vote for elective bodies, central or local, and his liability to perform civic duties, such as serving on juries or aiding in maintaining order. See D. Chalmers & C. Asquith, *Outlines of Constitutional Law* (1930), pp. 6-7.

come to be called constitutional countries, and today when one speaks of a constitution, it is usual to take it as providing invariably for the establishment of constitutional government. Accordingly, it may be said that a constitutional country is one that has a constitution in this sense. It does not matter whether what is meant by a constitution here is in written form or not.

This political principle, adopted in the French Revolution, had a great influence upon the constitutions of other countries with the result that they all came to adopt the form of government assuming the three phases judicial, executive, and legislative in its practical working with a view to the guarantee of personal freedom and private property. What most influenced the French Revolution was Montesquieu's theory of the separate independence of the three powers. Montesquieu divided the working of the sovereign power into legislation, execution, and administration of justice, and held that these three powers should be exercised by three different machineries. According to him, those who have powers are apt to abuse them in the long run and become high-handed, thus deviating from their original aims; therefore, in order to prevent such a tendency it is necessary to make each of those powers stand independently and, by pitting them one against another, to restrain and balance and moderate each other. Before Montesquieu, Locke had divided the function of the sovereign power into three, legislative, executive, and

diplomatic, but he did not point out the necessity of the separate independence of these powers. It may thus be said that we owe these essential points of the theory of the separate independence of the three powers to Montesquieu's genius. These political rules combined with those held in modern states, have given birth to different forms of government in different countries according to their respective conditions, national structures, and changes of the times. For example, our country has adopted this principle under Imperial rule; America adheres strictly to this principle by drawing a hard and fast line between these three powers—judicial, executive, and legislative^①. And England and France make the legislature control the executive, either consciously or otherwise, according to this same principle.

SECTION III CONSTITUTIONS WRITTEN AND UNWRITTEN

A constitution is closely related to the political development of the country and may be considered a historical product of that development; consequently the provisions of a constitution on the above-mentioned points vary in different countries. Taking form into special account, we distinguish between a country

^① The separation of powers is a matter of agreement or convention made by the sovereign. Government is a unit, not a tripartite machine or device. But in order to administer government, and make it, as the business man would say, "a going concern," it is conceived and organized into departments. See F.N. Thorpe, *The Essentials of American Constitutional Law* (1917), p. 19.

with a written constitution and one with an unwritten constitution, in which latter case there is no written code of laws, only precedents and customary law being observed as the important elements of the constitution. Modern states have for the most part written constitutions^①. Japan, America, and France are among the number, while England^② is a typical country on the other side of the scale.

A written constitution is established as such from the beginning through special formalities and ordinarily stands higher than all other laws. Countries with written constitutions are of two kinds, those with an established constitutional code such as Japan and America and those with no established constitutional code like France, where a certain group of constitution-like laws serves as the constitution. These are the Constitutional Laws of 1875—on the organization of the Public Powers (*Loi du 25 février 1875, relative à l'organisation des pouvoirs publics*), on the Organization of the Senate (*Loi constitutionnelle du 24 février 1875, sur l'organisation*

^① A Constitution is said to be written when the whole of it is contained in one or more document or documents, which possess the force of law. The United States possesses a written Constitution, and so also do France, Belgium and Switzerland. In each of these countries the law of the Constitution is to be found either in one or more enactments dealing therewith. A Constitution is said to be unwritten when the legal rules of which it consists are not exhaustively set out in one or more formal documents. See D. Chalmers & C. Asquith, *Outlines of Constitutional Law* (1930), pp. 8-9.

^② To arrive at an understanding of English constitutional law it may be necessary to study numerous documents, including constitutional treaties like Magna Carta, the Bill of Rights, various statutes and judicial decisions. See *Ibid.* p. 9.

du Sénat), and on the Relation of the Public Powers (Loi constitutionnelle du 16 juillet 1875, sur les raports des pouvoirs publics). Sometimes statutes, orders, and international treaties constitute elements of a written constitution. In some countries, such as Japan, England, and America, international treaties have the same effect as statutes, while in others they have no binding force over the people unless recognized as domestic law.

In countries under unwritten constitutions, usages of a constitutional nature are regarded as law, and the customary law enforced by the courts of justice and the customs strictly observed in practice, are all regarded as elements of the constitution. In countries with such a constitution, no special formalities are necessary for its revision, nor can there be any difference between the constitution and other laws. In England there have been few constitutions in written form, and even in cases of constitutional provisions in written form, they are simply statutes or much less effective orders, and so these can be easily revised through legislative or order-instituting formalities in ordinary sessions of Parliament^①.

SECTION IV FORMALITIES FOR AMENDMENT

In countries under written constitutions, strict restrictions are laid down regarding the formalities for

① It is made up of the various principles of government stated in the Bill of Rights, the Act of Settlement, and other important acts of Parliament, together with the various practices and customs that have grown up. Some of these practices reach back to the Middle Ages, for the English people do not change them so long as they can be made to work. This is due to a great respect for precedent.

amending them. Article LXXIII of the Japanese Constitution provides formalities for making amendments in the Constitution thus: "When it shall become necessary in the future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order. In the above case, neither House can open the debate, unless at least two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained." Thus the right to propose amendments to the Constitution is in the hands of the Tenno only, and deliberation on the Constitution requires the presence of two-thirds of the whole number of Members votes being taken by two-thirds of the Members present, whereas deliberation on an ordinary bill requires the presence of one-third of the whole number of Members present, and only a majority vote of those present is required.

In the case of the American Constitution, complicated formalities are required for amendment. The actual provision runs: The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions

in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress^①. Amendments to the Constitution cannot even be proposed without the consent of two thirds of both Houses and that of the Legislatures of two thirds of the several states, and even if it is passed, ratification by Conventions in three fourths of the several states is still required. On the contrary, projects of ordinary laws become effective with the consent of more than one half of both Houses and of more than two thirds of the Members present, and are promulgated with the sanction of the President.

In Germany no such complicated formalities are required as in America, but the Weimar Constitution of 1919 provides that the passing of ordinary bills requires the approval of more than one half of the Members present in the Reichstag, whereas the constitution may be amended by legislative action. However, resolutions of the Reichstag for amendments to the constitution are valid only if two-thirds of the legal members are present and if two-thirds of those present give their assent. Moreover, resolutions of the Reichsrat for amendments to the constitution require

^① If a law passed by a state in America contravenes any provision of the Federal Constitution, the Supreme Court of the United States condemns it as *ultra vires*, just as the English judicial Committee of the Privy Council declares invalid any colonial law which conflicts with the provisions of an imperial statute. In the allocation of sovereign powers under a rigid constitution, the judicial bench, for certain purposes, is put in a position of superiority over the legislative department of government.

a two-thirds majority of all the votes cast. If by popular petition a constitutional amendment is to be submitted to a referendum, it must be approved by a majority of the qualified voters. In France, too, the houses shall have the right by separate resolutions, taken in each by an absolute majority of votes, either upon its own initiative or upon the request of the president of the Republic, to declare a revision of the constitutional laws necessary. After each of the two houses shall have come to this decision, they shall meet together in the National Assembly to proceed with the revision. The acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly which sits in Versailles^①.

SECTION V THE IMPERIAL HOUSE LAW

Article IV of the Japanese Constitution says: "The Tenno stands at the head of the Empire, combining in Himself the rights of Sovereignty." The Tenno, who combines in Himself the rights of sovereignty, is the source of all activities of the state and the supreme Head of the state in the absolute sense of the word. The King of England can be called Sovereign in the sense that he is the highest authority representing his country to other countries. In demo-

^① In England an alteration in the Constitution, such as an amendment in the rules relating to the succession to the Crown, can be effected by exactly the same machinery as an alteration in any ordinary law.

cratic countries and republics such as the United States, Germany, and France, the President, the authorized representative agent of the people, may be called Sovereign in the sense that he represents the people who are sovereigns, it being difficult, as a matter of fact, for the people themselves to represent the sovereign power although they are themselves holders of the supreme power.

As is well known, in monarchies such as Japan and England, the provisions on the positions of the Tenno and the King constitute in themselves the fundamental law of the state and consequently must be regarded as a constitution in its original sense. What, then, are provided in the Imperial House Law of Japan, the Act of Succession and otherlaws of England concerning the Imperial and the Royal Family?

The Imperial House Law was established on the 11th of February of the 22nd year of Meiji (1889) simultaneously with the promulgation of the Constitution. It consists of sixty-two articles in twelve chapters with an Imperial Edict as preamble. This law contains provisions concerning succession and ascension to the Throne, coronation, regency, the Tenno, and the Imperial Family. These provisions are exclusively confined to matters relating to the Imperial Family, but other particulars concerning the highest agency of the state, such as the Law of Succession to the Imperial Throne, The Regency Act, etc., all form an important part of the National

Law rather than the internal affairs of the Imperial House-hold. Therefore it must be admitted that Prince Hirobumi Ito was wrong when he said in his "Commentaries on the Imperial House Law of Japan" that "the Imperial House Law is a family law ordained and established by the Imperial Family itself." The originator of this law interpreted it as a family law of the Imperial Family and effective only within the Imperial Family. That is why, when it was enacted, it was neither countersigned by Ministers of State nor formally promulgated. However in the Formalities Act ordained in February of the 40th year of Meiji (1907), it is stipulated that amendments to the Imperial House Law should be countersigned not only by the Minister of the Imperial Household but by other Ministers of State and that it should be published in the Official Gazette. This clarified the fact that the Imperial House Law has the force of a national law. The supplementary provisions to the Imperial House Law ordained in the same month after the promulgation of the Formalities Act and those ordained in the 7th year of Taisho (1918) were countersigned by Ministers of State and were proclaimed all over the country.

No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet^①. The Imperial House Law includes very important laws of the country and in spite of the fact that all other laws must be submitted to

^① The Constitution, Art. LXXIV, Cl. 1.

Diet deliberation, this particular law, which originally concerns matters relating to the Imperial Family, is left to the decision of the Imperial Family and admits of no interference by the subjects.

Any alteration in or any addition to the Imperial House Law is, therefore, decided by the Tenno with the advice of the Imperial Family Council and of the Privy Council^①. This step is accounted for by the fact that while the Constitution and other laws are subject to sanction by the Tenno as Head of the Empire, this particular law requires the sanction of the Tenno as Head of the Imperial Family, although there is no difference between the former and the latter in that they all need Imperial sanction, and in the latter case advice is advanced in response to Imperial command. To sum up, the Tenno's will is the will of the Imperial Family and this will has the effect of a law of the country.

Both the Imperial House Law and the Constitution are the fundamental laws subordinate to which the laws and ordinances of the state form two large classes, one being of those relating to state affairs provided for in the Constitution and the other of those relating to the Imperial Family. Therefore no alteration is permissible in the Constitution on the ground of the Imperial House Law^②. As to whether or not any alteration can be made in the Imperial House Law by a revision of the Constitution,

^① The Imperial House Law, Art. LXII.

^② The Constitution, Art. LXXIV, Cl. 2.

there is no provision in the former, but since the former becomes effective as a national law only on the ground of the latter, we may be justified in interpreting alteration to be possible.

As to the relation of the Imperial House Law to other laws and ordinances, the former ranks, as far as it concerns the Imperial Family, higher in its validity than the latter, and such Imperial Ordinances, national laws, and decrees as are in conflict with the Imperial House Law or other ordinances along the same line, are all null and void. The Imperial Family Act is a statute establishing matters concerning the Imperial Family under the Imperial House Law and its form has been decided in conformity with the Formalities Act. According to the Formalities Act, regulations to be decided by the Imperial Family Act concern (a) the provisions of the Imperial House Law, (b) the machinery of the Court, and (c) business affairs relative to the Imperial Family. The Imperial Family Act is, like the Imperial House Law, established by the Tenno as the head of the Family with or sometimes without the advice of the Imperial Family Council or the Privy Council or both. When the provisions are confined to family affairs of the Imperial Family, they bear the countersignature of the Minister of the Imperial Household only, but when they constitute at the same time a law of the country, they are endorsed by the Prime Minister, or by both the same and the Minister in charge as well as the Minister of the Imperial Household.

In England there is no comprehensive written law in compact form concerning the Royal Family, such as the Imperial House Law of Japan. To be more exact, succession to the Crown is handled chiefly in the Act of Settlement enacted in 1701, supplemented by the fundamental principle of the law of succession in common law. As to accession to the Throne, it is provided for in the Act of Settlement, the Bill of Rights and other statutes, and a Regency is instituted, if necessary, by the King or by Parliament in conformity with traditional principles. What is most noteworthy in this connection is that whereas in Japan no revision of the Imperial House Law requires, as above stated, deliberation of the Diet and no interference by the subjects is permitted out of respect to the solemn Imperial Majesty, in England, on the contrary, an unlimited legislative power of Parliament is recognized even with regard to the Royal Family, and even succession to the Crown is subject to legislation. Further it is said that, if need be, even the enthronement and dethronement of the King, abolition of monarchical government, and establishment of republican government are within the power of Parliament.

SECTION VI OTHER AGENCIES OF THE IMPERIAL FAMILY

Various machineries are established, as provided in the Imperial House Law and others, which respond to the inquiry of the Tenno, act in an advisory

capacity to Him, and attend to various affairs of the Imperial Family. (a) The Imperial Family Council is composed of adult male members of the Imperial Family as a consultative machinery to respond to the inquiry of the Tenno concerning important affairs of the Family. At the meetings of this Council also sit the Lord Keeper of the Privy Seal, the President of the Privy Council, the Minister of the Imperial Household, the Minister of Justice, and the Chief Justice of the Supreme Court. However, they have no right whatever to join in decisions, their duty being simply to lay their views before the Council. The Tenno may sometimes personally preside over the Council, or appoint a member of the Family to act for Him. The Council will decide on matters relating to (a) alteration of the order of succession, (b) installation, and retirement, of a Regent necessitated by any incapacity of the Tenno, (c) alteration of the order of a Regent-elect, (d) appointment and retirement of an Imperial Governor, (e) disciplinary punishment of a member of the Imperial Family and its rescinding, (f) pronouncement of incompetency or quasi-incompetency of a member of the Imperial Family to manage his person and property and its rescinding^①, (g) amendment and enlargement of the Imperial House Law^②, (h) a member of the Imperial Family assuming the status of a subject (Supplement to the Imperial

^① The Imperial House Law, Arts. LIII, LIV : Property Act, Art. XXXI.

^② The Imperial House Law, Art., LXII.

House Law, 40th year of Meiji, Arts. I, II, IV, V.), and (i) pronouncement of the loss of parental authority of a member of the Imperial Family or of its reinstatement (Imperial Relative Act, Arts. LIV, LV). A meeting of the Imperial Council is generally held in response to the inquiry of the Tenno, but in such cases as when a Regency is to be instituted and when alteration has to be made in the order of a Regent-elect, etc. the member of the Imperial Family who is Regent-elect may convoke and preside over such a meeting at the request of more than one third of the adult members of the Imperial Family or at the request of the Privy Council, without waiting for the inquiry of the Tenno and preside over it. (b) The Minister of the Imperial Household is an machinery to act in an advisory capacity to the Tenno with regard to all affairs of the Imperial Family and, in addition, to attend to various affairs of the Family in obedience to the Imperial Mandate. An Imperial Rescript on the affairs of the Imperial Family, and Imperial Autograph, a revision of the Imperial House Law, the Imperial Family Act, and titles and court ranks which require the Imperial signature—all bear the countersignature of the Minister of the Imperial Household. (c) The Lord Keeper of the Privy Seal is the name of a post of a standing adviser to the Tenno created by the reform of the official organization in December of the 18th year of Meiji (1884). Although he is not in a responsible position, he is to wait on the Tenno, lay

his views before Him on affairs both of the Imperial Family and of the state, and thus to contribute to His wise judgment. The Privy Seal and the Seal of State are always kept in the office of the Lord Keeper of the Privy Seal, and therefore laws, Imperial Ordinances, and other Imperial Rescripts must necessarily go through that office. Besides, the office is in charge of affairs concerning Imperial Rescripts, Imperial Autographs and other court documents, receives petitions presented to the Tenno by His subjects according to the Petition Act, and after due investigation and report to the Tenno disposes of them in accordance with the Imperial wishes^①. (d) Other Agencies. (a) The Imperial Economic Council. This Council is an agency to respond to the inquiry of the Tenno about matters concerning the finances of the Imperial Family and is composed of the Lord Keeper of the Privy Seal, the Minister of the Imperial Household, and seven economic advisers to the Imperial Family, chosen by the command of the Tenno. (b) The Board of Deliberation of the Bureau of the Peerage and Court Honours. This is an agency to respond to the inquiry of the Tenno about important matters concerning the Imperial Family and is composed of the president and the members of the Board, i.e. three Privy Councillors, four court officials of "chokunin" rank, and five titled persons. (c) The Board of Deliberation for the Royal Houses and the

^① The Organization of the office of the Lord Keeper of the Privy Council, Arts. I, II; Petition Act, Arts. X, XIV.

Branches of the Imperial Family is forreppling to the Tenno's inquiry about important matters concerning the Royal Houses and the Branches of the Imperial Family. (d) The Imperial Governor. The Imperial Governor is an agency to take charge of the education and bringing up of the Tenno, when He is a minor, and is appointed by the Regent either in accordance with the will of the preceding Tenno or with the advice of the Imperial Family Council and with that of the Privy Council. The Imperial Governor devotes himself to the education and upbringing of the Tenno and never concerns himself with the supreme power. The Imperial House Law provides that neither the Regent nor any of his descendants can be appointed Imperial Governor, which suggests that the Imperial Governor is not a government official.

CHAPTER VI

A GENERAL SURVEY OF THE JAPANESE CONSTITUTION

SECTION I THE MORE IMPORTANT FEATURES

MPARING the Japanese Constitution with those of other countries of Europe and America, we find on the one hand common characteristics and on the other some peculiarities. More important features of the Japanese Constitution may be cited. (a) The Japanese Constitution is a constitution granted by the Tenno. It was proclaimed in an Imperial Rescript issued with the establishment of the Diet in the 14th year of Meiji (1881 A. D.) saying that a Constitution would soon be granted by the Tenno. In those days, the Diet having not yet been established, it was natural that the matter of legislation should come within the supreme power of the Tenno, and accordingly the Constitution was to be granted by the Tenno. (b) The right to propose amendments to the Japanese Constitution comes solely within the supreme power of the Tenno. The Imperial Constitution, having been granted by the Tenno alone, the right to propose amendments belongs exclusively to the Tenno, and no motion for amendments is permitted the Diet. This is a

significant fact in that it has established the principle of the Tenno's Constitution and makes the Constitution inviolable (c) The Imperial Family adopts the principle of autonomy. The Law of Succession to the Imperial Throne, the Regency Act, and other matters concerning the Imperial Family are decided by the Imperial Family, and all that is decided by the Imperial Family has a binding power over the state and the people. This is due to the fact that the Diet is considered to be unfit to participate in matters concerning the Imperial Family in view of our time-honoured tradition. (d) The direct rule of the Tenno is realized. The tenor of the Japanese Constitution makes the principle of the direct rule of the Tenno a thorough one, quite different from constitutions in Western Europe which stand on constitutionalism—reigning without governing. Though the Japanese Constitution has adopted the principle of the separation of powers, the Tenno, having one of the three, is never opposed to the Diet, but combining in Himself the rights of sovereignty, personally exercises the supreme power, the pivot of the three powers. (e) The supreme power in legislation and conclusion of treaties is reserved to the Tenno, although all legislation must be made through the Diet, but our Constitution acknowledges various exceptions. The Tenno issues or causes to be issued Ordinances necessary for the carrying out of the maintenance of public peace and order, and the promotion fo the welfare of the

subjects. No similar provisions are to be found in the Constitution of any other country. The Constitutions of various European countries usually provide that the consent of Parliament is required when the contents of treaties are related to domestic laws and involved a charge upon the Treasury, while the Japanese Constitution lays down no such restraint, but provides that declaration of war and conclusion of peace and treaties with foreign countries are unconditionally the exclusive rights of the Tenno. (f) The fundamental principle of the separation of military and administrative affairs is adopted. It is not acknowledged in a written code of the Constitution that the supreme command of the army and navy, distinguished from the supreme power in the affairs of state, is a power belonging independently to the army and navy, but it has been acted upon as customary law both before and since the promulgation of the Constitution.

SECTION II THREE SIDES OF THE STUDY

ARTICLE I THE LEGAL SIDE OF THE STUDY

The Japanese Constitution has never once been revised since its promulgation and in that respect it may be called an "immutable grand code." It consists of 7 chapters comprising 76 articles in all. The Preamble consists of an Imperial Edict, which constitutes part of the Constitution, and, like the text of the Constitution has the validity of a national law, eluci-

dating the fundamental objects of the Constitution and the basic principles of the national structure and the form of government, thus serve as a spiritual and teleological commentary on the provisions of the Constitution. In order to understand the spirit of the Constitution, therefore, it is necessary to study carefully the Preamble, i.e. the Imperial Edict. This Edict, pointing to the objects of the enactment of the Constitution, says: "Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are to be guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform." The Edict further reads: "We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law."

From the above we can throughly understand how

the Tenno makes His subjects' welfare and the promotion of the country's prosperity the primary object of the Constitution with no thought whatever of the promotion of His own interests. The Imperial Edict further says: "The rights of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants." By this the Tenno means to give precision to the spirit of monarchism which has continued unchanged since ancient times. It sets forth clearly the fact that the Tenno is the holder of the reins of government, that all the will of the State is subject to His will, that the activities of the State shall all originate in Him, and that all state affairs shall be under His control. It further clarifies the stand of the Tenno who, as a descendant of the Imperial Ancestors, succeeded to the sovereign authority of the Empire transmitted through one and the same unbroken dynasty of Tenno, and declares that this sovereign power shall be succeeded to by His posterity, from generation to generation and without an end, being coeval with heaven and earth. Thus it is clear that the sovereignty of the Tenno is forever attendant on the Imperial Throne which shall be immutable for all ages to come, that it is to be transmitted to His posterity without a break, and that it is absolutely inviolable, no person being allowed to trespass upon it. Such, indeed, is the essential character of the national structure of Japan.

Further, when the Tenno says in His Edict, "Our, Ministers of State, on Our behalf, shall be held

responsible for the carrying out of the Constitution" He means to point out the principle of responsible government. It implies that the Tenno being the holder of the sovereign power and His will being the highest will of the State, His actions shall be above all legal criticism. It is for this reason that the Ministers of the State, acting in an advisory capacity, are to handle state affairs on their own responsibility and in full conformity to the provisions of the Constitution. If by any chance there should be found defects in the rule of the Tenno, it is properly due to the inadequacy of the Ministers' counsel and the latter should hold themselves responsible for it accordingly. Never shall they shun their responsibility under the cloak of the Imperial command. Thus the Preamble, i.e. the Edict shows that the Tenno of unbroken lineage is the sole holder of the sovereign power, that the object of the sway of His power is not for His own private interests, but for the well-being of His subjects at large, and that the responsibility for the enforcement of the Constitution should be borne by the Ministers of State.

Article I of the Constitution says: "The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal." It is intended thereby to make clear that the Japanese state has been since its foundation, and shall for all ages to come, continue to grow without a break, and that, over and above all, it shall always be ruled by a Tenno who succeeds to the Throne transmitted

through an unbroken line of rulers, viz. that He is to be looked up to as the only source of governmental functions and this country is the only monarchy in the world which has lasted unchanged and shall continue so even to eternity. We see also that it was not with the promulgation of the Constitution that such a form of government came into being, but that it began with the very foundation of the country, with the then Tenno as the holder of the sovereign power, and that it shall remain unchanged as long as the Empire shall last. Article I of the Constitution therefore, adds nothing new to the nature of the form of government. By the words "of an unbroken lineage," it is intended to show that in the history of Japan the Imperial Family has since ancient times lasted in an ever unbroken line and that it shall last as long as heaven and earth shall last. These words are seen only in the Japanese Constitution. The constitution of no other country has ever been known to contain words conveying the same meaning that these words do. Lindsay Rogers, laying strong emphasis on this point, extols Article I as being characteristic of the Japanese Constitution, well worthy to be a pride to the world. The fact that no person except a member of the Imperial Family can succeed to the Throne, is accepted as legally peculiar to the Japanese national structure.

As may be seen from the above, monarchism in Japan is established on a long historical basis and is believed to identify itself with the existence of the

Empire. Indeed necessity may arise for revision of other provisions of the Constitution at some time in the future, but the fundamental principle that successive Tenno shall reign over and govern the country is unchangeably established. This is its outstanding characteristic. Monarchies there are many, but nowhere else is the spirit of monarchism so declared and so pronounced as in Japan. England is, like Japan, a monarchical state, but the royal lineage is quite different from our Imperial lineage. When Queen Anne died (1714) in the beginning of the eighteenth century, there was none to be heir to the throne, which however finally went (1714) to George I., elector of Hanover, a grandson on the mother's side of James I (1603-1625) and an ancestor of the present King George VI. of England. George I. did not understand the English language. His son George II. did indeed understand it, but very little, and had a German accent. Only in George III. do we find an English king of England both in name and in fact. In England, where the royal lineage is of such a nature, the king naturally occupies the throne in name only out of state necessity and is a mere symbol of the state, having no real sovereign power. W. B. Munro says that even if England should abolish the king, there would be no change at all in the form of government, which is democratic. It is a noteworthy fact that not only England but all other countries in Europe are the same in this respect. The fact that the Tenno belongs to the Imperial Family of

an unbroken lineage and holds the sovereign power, legally and in fact, and has no parallel in the world, leads us to the conclusion that the Tenno has a very extensive sovereign authority which has never existed in other countries. Article IV. of the Constitution says: The Tenno stands at the head of the land, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution. This is equivalent to saying that while the Tenno ought to act in conformity to the provisions of the Constitution as far as those provisions are concerned, He is free in all other matters to use His sovereign power as He pleases. On the contrary, Article LXXVIII of the Belgian constitution says in effect that the king shall have no other powers than those which the constitution and the special laws, enacted under the constitution, formally confer upon him. Again Article XI of the old Danish constitution^①, revised in July, 1866, says that the king has the highest power in all state affairs within the limits stipulated in the constitution and handles them through the ministers of state. This amounts to saying that the king is allowed to handle such matters only as are mentioned in the constitution and cannot go beyond that limit. All these studies go to testify to the fact that the national structure of Japan has no parallel in the whole world.

^① Der König hat mit den in diesem Grundgesetz festgesetzten Einschränkungen die höchste Gewalt über alle Angelegenheiten des Reiches und über diese durch seine Minister aus.

ARTICLE II THE SOCIOLOGICAL SIDE OF THE STUDY

We have examined how the spirit of the Japanese Constitution can be observed from the legal standpoint. Now we shall consider what relations there exist between this spirit and the nation's ideas of the state, that is what ideas the nation holds about the national structure from the viewpoint of their national life, for that will reveal more clearly, more exactly, the essential spirit of the Constitution. We are coming to a sociological survey of the subject.

Sociologically, there are various processes conceived of social development. The most natural and the most ideal is the development of a group into a family, next into a race, then into a city state, and last of all into the state; and this process is based upon blood relationship. When we come to consider the process of the development of Japan, we realize that the source of the Yamato race, the nucleus of the Japanese state, was the Imperial Family, which spreading and expanding into branches of the same blood relationship, has grown into the present nation. The Imperial family is to the nation what a tree-trunk is to the branches and leaves. Just as the nourishment absorbed by the roots flows through the trunk and branches, the same blood runs through the Imperial family and the people. Thus in Japan the two have stood in father-and-son blood relationship for the past more than two thousand five hundred

years, and this relation has endured unimpaired throughout. True, there were races other than the Yamato race, such as the Ainu and some naturalized Chinese and Koreans, all known as "strange tribes," and for this reason the Japanese people may not be called a homogeneous race, but then these were not conquered by force; far from it, they were assimilated gradually with the Yamato race centering about the Imperial family, and finally became unified with the Japanese proper, emerging with the lapse of time as pure Japanese. In this process, force played no part and the whole nation grew up as a veritable huge family, ever firmly united. As in the case with the Yamato race, the Imperial family remained in close relation with these strange people, the former being like a father in his household and the latter like his children.

As may be seen from the above statement, the process of development of this country was socio-logically the most ideal, having its source in the blood relationship centering about the Yamato race. The history of Japan well testifies to this fact. One may think it quite natural that parents should love their children. That is their instinct. The fact that the successive Tenno loved the people as parents would have done, has been revealed in countless instances through the long history of Japan. Does not the nation remember with profound gratitude the benevolent spirit shown by Nintoku Tenno? Who was it but Go-Daigo Tenno that, while in exile in Oki Island,

wrote the well-known verse out of anxiety about his subjects?

“Woe to this sorrow of my heart
Ever on the misery of my people!”

Nobody will fail to see the paternal affection revealed in these short lines. Later in our time we find the same paternal feeling overflowingly revealed in the Imperial Rescripts of Meiji Tenno and Taisho Tenno issued respectively on the occasion of their enthronement.

The successive Tenno, being all of such a benevolent spirit, the people looked up to them as they would have done to their fathers and submitted to them with loyalty from the depths of their hearts. In the Family Precepts of the Otomos, a passage reads:

“Be my body tossed by rolling waves,
Be it lost in a mountain wilderness,
Yet I lay me down to my Sovereign
And naught do I regret my fate.”

One may see in this the affectionate ties between Sovereign and subjects fully revealed. Further, the Buddhist priest Kei-Getsu-Bo of the Kiyomidzu temple wrote thus:

“A word from the throne as it was,
Did he sacrifice himself
As brave as a Samurai,
Though not of any such family.”

Umpin Umeda (1816-1859 A. D.), a leading royalist in the political movement for reverence for the Tenno and expulsion of foreigners, wrote:

“My heart aches for the peace of my Lord,
Off my own self all desires shaken!”

Thus it will be seen that the love of the people has been, and still is, the primary object of the successive Tenno and the guiding principle in their rule. The people, in turn, have had never-failing respect for their Tenno as they would have respected their fathers, and have submitted to them with unmixed loyalty. These close ties between Tenno and people have made Japan what she is to-day. It is a fact utterly unaccountable to the Europeans and Americans whose history is one of strife between rulers and people. In the case of the Japanese, such close relations between Tenno and people gave rise to the Japanese ideology, “Imperial Centralism,” which served to establish the distinction between Sovereign and people, gave birth to the principle of direct Imperial rule, and developed the ideal of unity of loyalty and filial piety. Consequently, the relations between governing and governed and the sense of the correlation of different classes are radically different from those in European countries which are developed from legal considerations accruing from the ideas of rights and duties. As much different are they from those which are observed under the autocracy which sways the world to-day on the principle, “Ignorant obedience of the people.”

Furthermore, the Japanese ideas of ancestor-worship are another phase of the nation’s faith with regard to the national structure which is the main-

stay of the Constitution. The late Gijin Okuda (1860-1917), Minister of Education and Justice, said in his article "On the Family System" appearing in the magazine *Tō-A-no-Hikari* (Ex Oriente Lux): "The national structure of Japan is a manifestation of the spirit of ancestor-worship cultivated under the family system." Ancestor-worship in Japan further solidified itself in the form of Shinto-ism, a cult peculiar to Japan alone, which serves as a strong chain binding the spiritual unity of the whole nation.

Since Shinto-ism is a religion of ancestor-worship, Imperial ancestors are adored and worshipped not only by the Tenno himself but by all Japanese, even by the meanest of them. This nation-wide faith has crystallized into the people's latent consciousness that the Tenno is the living god holding sovereign power as a descendant of the Sun Goddess, who, according to their faith, reigned over the country in time immemorial. This consciousness breeds the conception of the Sacred Imperial Rule, under which the people remain firmly united in being loyal to the Tenno in an untiring effort to bring ever greater prosperity of the country. With regard to the Sacred Rule in Japan, Lord Chikafusa Kitabatake, the author of the *Jinnō Shōtōki* (神皇正統記) (1339 A.D.), said that Japan is ruled by a god. This peculiar faith in divine rule is common to all Japanese, having been transmitted from generation to generation from dim antiquity.

The Tenno is sometimes called by another name *Seijo*. *Sei* means *sacred*, which by extension means "to reign the day, i. e. country." *Jo*, means *above*, which by extension means "the god above" or "one in heaven." Thus the words jointly mean "the god who rules." It must be noted, however, that the religious conception that the god, i. e. Tenno rules over the country is completely different from the Chinese or Jewish ideas of divine rule, though at first sight it seems similar in logicizing processes. In Japan the Tenno is regarded as the living god who rules over the country as such. A passage in the *Kōdokan-ki* reads: "In time immemorial the gods laid the foundation of the country and began the divine rule. The Imperial Throne shall thus be forever prosperous; the dignity of the state shall remain forever unimpaired. It is but natural that the loyalty and filial piety of the people, from the samurai to the meanest of men, should know no parallel in the world. Surely the spirits of the gods in heaven must bear witness to this fact." The Chinese ideas of heaven and heavenly gods stand quite independent of the ideas of ruler. The Chinese think that heaven rules over the country through the agency of the ruler. Therefore, it is necessary that a ruler should obey heaven. If a ruler should fail to be obedient to heaven's commands, he will be dethroned just as a servant will rightly be dismissed if he does not please his master. In Chinese history we read: "He who is master of the land is

heaven; he who acts according to the commands of heaven is the ruler.”^① We also read: Fu-hi, Shönnung, Yellow Emperor, Yau, and Shun^②, in obedience to heaven, laid the foundation of the country^③. Such are the fundamental ideas of the Chinese about the state. The Japanese speak of “foundation by the gods,” while the Chinese speak of “foundation according to the will of heaven.” Herein lies the radical difference between the religious view of government held by the Chinese and that of the Japanese. The Jews had their Jehovah, the invisible god, in obedience to whose commands they believed their kings ruled over the land. It may be said in this respect that the Jews had their divine rule, but it must be noted that the king was not Jehovah himself. The king merely ruled in obedience to Jehovah’s will, which meant that the rule of Jehovah was constant and unchanged, but the king and his family were constantly at the mercy of fortune. He did not hold the permanent position of king.

During the years covering the fifth and thirteenth centuries after the introduction of Christianity into Europe, such a religious view of government was shared by many Christian countries, whose guiding principle was exactly the same as that of the Jews. Similar to these were the ideas of divine rule advocated by Calvin, etc. after the Middle Ages. Thus

① See *Kuliang Chuan* (殼梁傳).

② F. Hirth, *The Ancient History of China to the End of the Chou Dynasty*” (1923).

③ See *Tahio Chii-Commentary of Great Learning* (大學敍).

the relations of God and rulers in Europe were much the same as those in China, while those of the gods and Tenno were entirely different. In the former two cases, God and ruler are two separate personalities, while in the latter the Tenno is at once a god and ruler. Thus Japan may be said to be a spiritual state since it is ruled over by the Tenno who combines in himself the two personalities of god and ruler. We may safely call such a rule "Pure Shintoistic Rule," "Rule according to the Way of the Tenno," or "Rule of the Trinity of God, Sovereign, and Man." This faith that the country is ruled over by a living god is a view of the state peculiar to Japan, which sprang up from ancestor-worship.

Furthermore, the religion of ancestor-worship, which is in essence the worship of the Imperial ancestors, has led to a passion for hereditary succession. This took shape in the unbroken lineage of the Imperial family on one hand, and on the other the custom of respect of family names and of the family system. Therefore, the people, are one and all, firm in the belief that the Imperial family shall forever be of one unbroken line; and they take pride in having such a family to rule over them. Kiyomaro Wake (769 A. D.), in reporting the historically famous oracle of the god Hachiman enshrined at Usa, said: "Ever since the foundation of the country, a clear distinction exists between Sovereign and people. Never was there any who, once a subject, became a

Sovereign. None but the heir to the Tenno has ever succeeded to the Throne. The unjust shall be expelled forthwith." Shinzan Tani (1669-1718 A.D.), the famous Shintoist, said: "Blessed be the Tenno who is a descendant of the Sun Goddess, whose line shall extend over millions and millions of years as one day. In Western lands, countries come but of massacre, which is their foundation. The good rule of the sacred emperors Yau and Shun (in China) did, indeed, realize its ideal in a manner, but not in our natural course." Tameoki Ōyama a Japanese classical scholar, said (c. 1651 A. D.), "One long continuity of more than a hundred Tenno has reigned over us since the foundation of the country. Change there was none, nor shall there be any. The Tenno is of the very flesh and blood of the Sun Goddess—the privilege of this divine Land alone." In such a belief have lived the people of Japan and it is to them a matter of course admitting of no doubt that their country shall be reigned over by an unbroken line of Divine Tenno for ages eternal. It is no wonder, and sociologically right, that Article I of the Constitution says: "The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal."

As may have been seen already, Japan has achieved quite a natural and sociologically the most ideal development, and in consequence it is clear that there exists a blood relation between Tenno and people—a form of patriarchal government, which,

combined with the religious ideas of ancestor-worship, has developed the existing divine rule. It is an undeniable fact that the conception of State peculiar to Japan has, all through the varied sociological stages, been cultivated in the people's minds and has borne the beautiful fruit of the Sovereign Rule. Thus it must be noted that although the promulgation of the Constitution was made after the European and American, it had existed deeply rooted in the national faith long before its enactment. Indeed, there are some countries in Europe and America which through similar sociological stages have arrived at patriarchal government, but most of them are not accompanied by the faith of ancestor-worship. Even where it is found, it has not come through the same sociological process. In Japan, both patriarchal government and ancestor-worship have found a happy harmony, which, tempered with the national character through the long years, has achieved a peculiar national structure of its own. It is, indeed, the finest, the unrivaled, the unparalleled in the world. It is but right that the Japanese people should endeavour to live up to this fact and take pride in it. In conclusion, we venture to say that the national structure of Japan rests on a solid foundation deep in the Japanese race—a naturally evolved harmonious race—and serves to unite it, both by virtue of tradition and for psychological reasons. It is the tie that binds the race together, the centre to which it is unified, the symbol that reflects it.

Here one must see that the Japanese national structure developed first among primitive tribes, then among communities, and is now found in the grand uni-racial society organized on the unity of Sovereign and people. Perhaps nowhere else in the civilized world is found the perfection with which the unity of a race, naturally developed in happy harmony, has been achieved with such brilliant success. Extending over and permeating this grand uni-racial society is the Japanese state,—a derivative society, a society with an object, solidified by the national polity.

ARTICLE III THE HISTORICAL SIDE OF THE STUDY

The proverb says, "Rome was not built in a day." In fact, no state can be built in a day. It requires a long lapse of time and the untiring efforts of the people. Accordingly, no country has ever made its constitution, which declares the guiding principles of government, simply in conformity to the spirit of the time of its enactment, but invariably to the innate spirit of the race and the state active among the people since its foundation, nay, to be more exact, since before its foundation. As for the Japanese Constitution, it was born of the Japanese spirit ever dominant among the people since the descent on this land of the grandson of the Sun Goddess, and not of the Japanese spirit of the Meiji era when it was first promulgated. It was made in conformity to the national structure coeval

with heaven and earth—a harmony existing for more than two thousand five hundred years of the country's history, tradition and customs and also of its racial spirit as well as of its national characteristics. It may be said to symbolize the national structure which has remained and shall remain, unimpaired through all ages. From this viewpoint, the true study of the Constitution is impossible without recourse to a historical method based upon historical facts.

Therefore, even in case one should discover any term or terms apparently the same in meaning as those used in other constitutions, one should take care to try to catch the true meaning thereof, ever keeping in mind the traditional spirit of the people constituting the Empire of Japan. F. N. Thorpe, writing in his book "Essentials of American Constitutional Law" about the interpretation of the American Constitution, says: "In order to understand American constitutional law it is necessary also to be familiar with American political and constitutional history. Without that history, that law lacks background and circumstance."

The history of Japan has since its foundation been built up on a basis entirely different from that of any other country. The noteworthy characteristic is that the relations between Tenno and subject, or in other words, governing and governed, have no parallel anywhere outside Japan. They are something peculiar to Japan. Naturally, the Constitution in which these relations are clarified, is purely Japanese:

it is neither European nor American. It is the fruit of the Japanese spirit handed down from our ancestors through the long past ages.

In the Imperial Ordinance issued on the promulgation of the Constitution Meiji Tenno says: "We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors." This is but to show that the Japanese Constitution is a historical product. In the "Clarification of the National Polity," issued on February 8, 1937, by the Hayashi ministry, we read:

"The Gracious Message has deeply impressed on us that the guiding principle for all his subjects

consists in discharging administration and public service, and in further exemplifying the high ideals of the foundation of the state, pursuant to the Gracious Will and in Compliance with the matchless structure of the state.

"In view of the weighty situation at home and abroad, and in consideration of the demand of the times, the present ministry does hereby present its platform as follows:

"It expects to clarify the national polity still further, to cultivate loyalty to the sovereign and heavenly and earthly gods, to promote the perfect unity of the divinity of the Imperial Ancestors and the State, so as to develop the national prestige.

"In compliance with the stipulations of the Imperial Constitution, the government intends to stimulate the wholesome growth of the constitutional form of government peculiar to the conditions of Japan and to listen to the will and pleas of the people, so as to make administration function smoothly."

Prince Hirobumi Ito, one of the drafters of the Constitution, said in his Commentaries on the Constitution of the Empire of Japan, "He (The first Tenno) was also called Tenno governing the country for the first time (Hatsu-kuni-shirasu Sumera-mikoto). A Prince named Yamato-take-no-Mikoto said: 'I am a son of the Tenno Otarashihiko-Oshiro-Wake, who resides in the palace of Hishiro at Makimuku, and who governs the Country of Eight Great Islands.' Mommu Tenno (697-707 A. D.) declared at the time

of his accession to the Throne: 'As long as Tenno shall beget sons, We shall, each in His succession, govern the Country of Eight Great Islands.' The same Tenno also said: 'We shall reduce the realm to tranquility and bestow Our loving care upon Our beloved subjects.' Such, in brief, has been the principle by which the Tenno of every age has been guided on succeeding to the Throne. Latterly, the phrase "the Tenno reigning over and governing the Country of Eight Great Islands" (*Oyashima-shiroshimesu Sumeramikoto*) came to be used as a regular formula in Imperial Rescripts. The word *shiroshimesu* means reigning over and governing. It will thus be seen that the Imperial Ancestors regarded their Heaven-bestowed duties with great reverence. They have shown that the purpose of a monarchical government is to reign over the country and govern the people, and not to minister to the private wants of individuals or of families. Such is the fundamental basis of the present Constitution."^① This reveals the fact that the fundamental idea of the Constitution is to accept the Tenno as ruler and the Imperial Family as the centre of the people, with historical facts ever in sight.

^① Hirobumi Ito, *Commentaries on the Constitution of the Empire*, pp. 3-4.

PART III
THE SUBJECT OF GOVERNMENT

CHAPTER VII
SOVEREIGNTY[®]

SHE Sovereign[®] is the person or persons having supreme authority in an independent political society. In every state there must be a sovereign power, which controls the functions of government and regulates the intercourse of the state with other political

① This question seems, perhaps, reminiscent of the much-canvassed investigation into the seat of 'sovereignty' in the State, an investigation which has, of recent years at least, been regarded with detachment or disinterest by the lawyer, who is not also a student of political philosophy. It is not the intention here to enter into any full discussion of the theory of sovereignty; but a few words will serve to place the subject in relation to that under immediate treatment.....It is enough, then, to note that the student of the early nineteenth century was impressed with the doctrine that sovereignty or supreme power in the State must, first, reside in one body or person, or one collection of bodies or persons. It must be undivided. Secondly, it must be independent of all control. It may be suggested as tolerably clear that at the present day no such sovereign as this exists in the British Constitution. See C. S. Emden, *Principles of British Constitutional Law* (1925), P. 116.

② When the American nation, a sovereign, created a government of delegated powers, under the constitution, it delegated to that government powers adequate to its purpose as a nation. The essential purpose of sovereignty is to continue sovereign. The word "sovereign" though not occurring in the Constitution is necessarily implied as a permanent quality or mark of the power that ordained and established the Constitution. Sovereignty cannot be delegated, but a supreme law, such as the Constitution, necessarily implies a sovereignty

societies. The aggregate of powers possessed by the ruler of a political society is called sovereignty^①. Sovereignty means causing a whole nation to live a coöperative life and to see that every one finds his right place. In other words, it means the issuing of laws to a community of people and their government. Herein lies the difference between sovereignty and other powers; herein originate the supreme, independent, unlimited, indivisible, and other qualities of sovereignty. (a) Sovereignty is the supreme power. Power means will power, a strong will against a weak will. Between two wills of equal strength we recognize the existence of rights, but not the existence of power. That sovereignty is the highest power means that it is not subordinate to any other power nor is there any other power within the state that can stand against it. It may be

that has delegated the powers expressed or implied in the Constitution itself. In other words, the Constitution of the United States is the supreme law of the land because the people of the United States are a sovereign. Sovereignty alone has original powers; all others are delegated. Thus the Constitution itself declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. American constitutional law is, therefore, the authoritative formulation, in constitutional, or statutory, or treaty form, of the will of the sovereign, the people of the United States. This formulation accords with the powers delegated by that sovereign. The expression of this delegation of powers in the conduct of the public business is government. Therefore in America, government is another word for the delegation of powers,.....for limitations of authority. Sovereignty is unlimited; government is limited. F. N. Thorpe, *The Essentials of American Constitutional Law* (1917), pp. 15-16.

① Grotius's definition of sovereignty is as follows: "Summa potestas illa dicitur cuius actus alterius juri non subsunt."

noted, however, that sovereignty sometimes puts itself under restriction as in the case of the recognition of extra-territoriality among nations, one country permitting the exercise of the sovereign power of another within its own territory. Such self-imposed restriction of the free will of the state does not prevent sovereignty from remaining the highest power. (b) Sovereignty is an independent power. By an independent power is meant not an acquired power but one proper to the state from the beginning. Even communities in the state, such as cities, towns, and villages, have the power to govern, i. e. the power to command and to compel, but these are delegated sovereignty and therefore are not proper to them. (c) Sovereignty is one and indivisible. The will of a will-subject belongs exclusively to its subject, and is one and indivisible. Sovereignty, too, is one in its essence and is indivisible. The indivisibility of sovereignty is in no way interfered with by a federal system or by the principle of the separate independence of powers. In a federal system, the national affairs are divided, some of them being transacted by the federated states and others by each constituent state. This does not mean that one will is divided among several states, but that the national will is made to belong in part to several states. Even in the case of the principle of the separate independence of powers, sovereignty is not divided into three powers, the judicial, the executive and the legislative, but the working of sovereignty

is simply taken to assume these three phases. (d) Sovereignty is unlimited. The activity of the state is not limited within a definite period of time nor within the sphere of a definite object, but, is permanent and unlimited. Consequently it is never limited with regard to its legal action.

In short, sovereignty is, except when determinable by special rights under international law, the absolute power of the state to determine its own organization, to govern all the people and things within its territory and its own people outside the territory, and to perform various functions necessary to attain its aim, all within the bounds set by national and international law.

CHAPTER VIII

THE CONSTITUTIONAL POSITION OF THE TENNO

HE Tenno stands at the head of the Empire of Japan, possessing the supreme power. Article IV of the Japanese Constitution reads: "The Tenno stands at the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution." By this it is intended to clarify the position of the Tenno. However, as has already been stated, it was not the enactment of the Constitution that established the Tenno's status, but it had already been firmly established simultaneously with the fact of the foundation of the country. The reason why Article IV is made to specify the position of the Tenno is, as shown in the Preamble, simply to give precision in written form to the nature of the already existing national structure and the principle of the Tenno's rule. The words, "The Tenno stands at the head of the Empire" shows that He occupies the supreme position over and above His subjects in His state. In His supreme position, He supervises all state affairs on the one hand, while on the other He represents the State to other countries. The Tenno is, in fact, the source of all state activities. From

such considerations, the drafters of the Constitution must be taken to have regarded the state as a kind of living organism and, comparing it to a human body, attributed all state activities to the brain of the Tenno Himself, i. e. the will of the Tenno. It is indeed in this sense that the Tenno is the head of the Empire. S. Hozumi says that, if described in legal terms, our national structure justifies the natural will of a natural man on the Throne as the legal will of the State; and well he may say so, as, indeed, the will of the Tenno is the will of the State and by extension we may say that the conduct of the Tenno is the conduct of the State. Thus the words "combining in Himself the rights of sovereignty" in Article IV may be taken to clarify the fact that the Tenno is the firm holder of the reigning power in its entirety, namely, that He is the source, the very essence, of the governing power.

Such an interpretation is in perfect accord with the ideas of our national structure, which has remained ever unchanged since the foundation of Japan. It is in perfect accord with the Sun Goddess' Edict issued on the occasion of the descent of the Heavenly Grandson on this land. It is in perfect accord with all the historical facts on record and also with the words of the late Meiji Tenno in His Edict, the Preamble, which reads: "The rights of sovereignty of the State, We have inherited from Our ancestors, and We shall bequeath them to Our descendants." Indeed, the former part of Article IV

is especially significant in that it clarifies the fact that the functions of government, legally considered, always originate in the will of the Tenno, namely, that the Tenno is the source of the governing power.

It must be noted, however, that the head of the state is not always the holder of the sovereign power. As has been repeatedly stated, the Tenno is at once the Sovereign and the Holder of the sovereign power. It is not the case with other monarchical countries. Japan may be an exception. For instance, the king of England is, indeed, sovereign of the country, but he is not the holder of the sovereign power, except when he is acting in the capacity of king in the state, i. e. when he is connected with Parliament in session, and not when he is outside Parliament. We now see that this is entirely different from the case of the Tenno.

The latter part of Article IV reads: "The Tenno...exercises them (i. e. the rights of sovereignty), according to the provisions of the present Constitution," by which it is intended to show the way in which the sovereign power is to be exercised. It makes it clear that Japan is a constitutional monarchy, by which is meant a country where each member of the nation supports, in his status of one who is governed directly or indirectly, the rule of the Tenno who is the holder of the reigning power. Originally, the idea of constitutional government arose first in England in the eighteenth century, gradually spreading to other countries until

in the nineteenth century nearly all civilized countries had adopted it. This idea is based upon the conceptions of self-government, liberty and equality, from which accrue the principles of government by law and of the separate independence of the three powers,—the foundational principles of constitutional government.

However, the extent to which these principles are to be adopted differs in different countries, being determinable only by the historical background, the national structure, and the social conditions of the country concerned. Not all constitutional countries can adopt these principles in a wholesale manner. Switzerland stands on direct democracy, the United States of America on the principle of the independence of the three powers, England on parliamentarism, and Japan on Imperial Centralism. Some jurists, however, insist that the principles of constitutional government should be applied to Japan in just the same degree as they are applied to other countries, thereby misinterpreting the sovereign power of the Emperor in a manner unpardonable from the Japanese standpoint of Imperial Centralism. It is a great mistake to conclude hastily that these principles are equally applicable to all countries. England has her own principles of government. So has America, and so has Japan. In Japan, the principles of government consist in governing with the Tenno as the sole holder of the sovereign power, i. e. governing with the Tenno in the centre. In other

words, the Tenno Himself attends to state affairs, which is the direct rule of the Tenno. It is entirely different from the principles followed in other countries, where their ideals of constitutionalism require that "le roi régne et ne gouverne pas." In interpreting the Constitution of Japan, which is a constitutional country, it is necessary ever to keep in mind this basic idea which is peculiar to the country. In Japan, the Constitution provides in Article V: "The Tenno exercises the legislative power with the consent of the Imperial Diet," which shows that the Imperial Diet is the medium for the Tenno's approval concerning legislation.

Now we shall pass on to Article LVII of the Constitution, which reads: "The Judicature shall be exercised by the Courts of Law according to law, in the name of the Tenno. The organization of the Courts of Law shall be determined by law." By this it is intended to show that the courts of justice are the executive organs serving as proxy for the Tenno as far as His judicial power is concerned. Further, Articles IX-XVI, which also concern His judicial power, declare the adoption of the principle of the independence of the three powers, one of the foundational principles of constitutional government. Strictly speaking, however, this principle is not such as is accepted in America and the Philippines, nor is it the same as that adhered to in England, where the king has the three powers all to himself against Parliament. In Japan, the Tenno holds the sover-

eign power, i. e., the ruling authority, and Himself deals with such affairs as come within this power which is considered the most sacred of the three powers. This fact is indeed peculiar to Japan. With regard to another one, i. e. that of constitutional government by law adopted by Japan, the Tenno holds the two rights of proposing revision of the Constitution and of making decisions thereon, which is rarely the case with other countries. Besides the Tenno has the supreme power concerning treaties with other countries as well a comparatively wide field of legislation.

Over and above all this, Article III, with special reference to the principle of government by law, says: "The Tenno is sacred and inviolable," which is still another feature of the Japanese Constitution. The constitutions of European monarchies, viz., of France in 1814 under monarchical rule, granted by the then emperor (Art. XIII)^①, of Italy (Art. IV)^②, of Belgium (Art. LXIII)^③, of Norway (Art. V)^④, of Denmark (Art. XII)^⑤, of Prussia, old (Art. XXXXIII)^⑥, of Hungary, old (Art. I)^⑦, of Spain, old (Art.

① Charte constitutionnelle du 4 juin 1814. La personne du Roi est inviolable et sacrée.

② La personne du Roi est sacrée et inviolable.

③ The person of the King is inviolable; his ministers are responsible.

④ La personne du Roi est sacrée: il ne peut être blâmé ni accusé.

⑤ Der König ist von Verantwortung frei; seine Person ist heilig und unverletzlich.

⑥ Die Person des Königs ist unverletzlich.

⑦ La personne de S. M. le Roi est sainte et inviolable.

XXXXVIII)^①, of Portugal (Art. LXXII)^②, of Turkey, old (Art. V)^③,—all these contain words corresponding to “the life of the king” and “the person of the king is sacred and inviolable” or simply “is inviolable.” Between this and the provision in the Japanese Constitution there is a great difference, as we shall see later on.

Properly speaking, the practice of determining the head of the state as inviolable is one that has existed since ancient times. The first written provision of this kind is the legal recognition of the Roman consuls as sacred and inviolable in the days when there was friction between the Roman nobility and commoners. In the Middle Ages in Europe, when the powers of the Pope were strongest, the head of the state was considered as sacred on the assumption that his sovereign power was granted by God, while in Japan the same idea has its origin in the nation’s traditional belief that the successive Tenno of Japan are of divine nature inasmuch as their sovereign power was first granted by the Sun Goddess. Therefore, the word “sacred” implies that the divinity of the Tenno is absolute, i. e. that He is inviolable in the sense that He is not liable to legal responsibility for anything He may be pleased to do. This inviolability of the Tenno is the proper

^① La personne du Roi est sacrée et inviolable.

^② La personne du Roi est inviolable et sacrée. Elle n'est soumise à aucune responsabilité.

^③ Die Person des Sultans ist geheiligt. Er selbst ist unverantwortlich.

inference from the premise that since He is the holder of the sovereign power with the supreme will within the limits of the state, there exists no other will justified to legally call Him to account for anything He pleases to do. Again, this inviolability of the Tenno originates in the essential nature of the Tenno as the holder of the sovereign power, and so even without the provision of Article III, He is not to be made to shoulder responsibility for anything He may do within the limits of His sovereign power. This article is but a written clarification of the Tenno's being legally sacred, inviolable, and non-responsible on the ground that He has the unique personality, most exalted, most supreme, and most majestic.

Viewed from the considerations of criminal law, the same may be said of the Tenno. He commits no crimes, for the criminal law aims at control over the conduct of His subjects in general and He Himself remains quite outside of the extent of its application. From this fact, not only is it seen that the conduct of the Tenno is beyond censure but also it must be understood that the words "sacred and inviolable" mean that nobody is justified in committing any act calculated to violate the sacredness of the Tenno.

In this connection it must be noted that in other countries this principle of the inviolability of the head of the state is associated with the provisions for the responsibilities of the state ministers,

who are made to hold themselves responsible for his disposition of state affairs, he himself being allowed to do practically nothing as he is in an inactive and nominal position. In Japan, the principle of the inviolability of the Tenno is entirely different. The Tenno, in the sphere of the provisions of the Constitution, is the holder of the power to rule over and govern the country, and compared with the sovereigns of other countries, He has the unique position of being the absolute centre of the nation and of the state.

CHAPTR IX

THE SUPREME POWER OF THE TENNO

SECTION I INTRODUCTRY REMARKS

HE supreme power means the power which belongs to the Tenno under national law. When the Tenno performs state acts by virtue of His supreme power, He is said to exercise, or put in effect, or use, or command that power. This supreme power is not what has developed out of the Constitution, but it has developed out of the very essence of the Constitution germinating simultaneously with the foundation of the country. However, since the Constitution is the fundamental law of the country and since naturally it provides all that is necessary concerning the supreme power, the power may practically be said to rest upon the basis of the Constitution.

Besides the supreme power provided for in the Constitution there are the supreme power under the laws of the Imperial Family and that under the customary law; the former, which is exercised with the advice of the Minister of the Imperial Household, being provided by the Imperial House Law and the Imperial Family Act, and the latter, which is the power to worship the spirits of the Imperial Ancestors, of the successive Tenno and of their Families, and to hold sacred services for all the

Gods of heaven and earth, being provided neither by the Constitution nor by the Imperial House Law. This latter supreme power is exercised, in its nature, without any one giving responsible advice to the Tenno.

The supreme power of the Tenno provided by the Constitution resolves itself into three, viz. (a) the supreme power over state affairs, (b) the supreme power of military command, and (c) the supreme power to confer honours, each being reinforced by a responsible advisory organ. Of these three, the first is exercised with the advice of the Ministers of State, and the second, with the advice of military and naval organs instead of Ministers of State. As for the third, it is exercised, under the present system, without the advice of Ministers of State. In England the King does not personally exercise his sovereignty with the idea of "supremacy in common law," and so the supreme power is to him nothing but a legal right on which he has legally the first claim. In England, therefore, the supreme power of the King can not be traced back to the power of governing the state as in Japan.

SECTION II THE SUPREME POWER OVER STATE AFFAIRS

The supreme power of the Tenno over state affairs covers, in its broad sense, the same sphere as His sovereign power, comprising the fields of legislation, administration, and judicature. The ju-

dicial power—exercised by courts of justice in the name of the Tenno, the executive power exercised by various administrative organs outside of matters personally attended to by the Tenno, and the legislative power exercised with the consent of the Imperial Diet—all merge in the supreme power of the Tenno. Although these powers are not personally wielded by the Tenno, the courts of justice and administrative organs possess their respective rights as entrusted to them by the Tenno, so that, it may be said, they all emanate from the supreme power of the Tenno. As to the exercise of the legislative power, the consent of the Imperial Diet is needed, which consent means only that the Diet gives its consent to the legislative act of the Tenno and nothing more. The Tenno exercises it personally over His subjects.

Most scholars have hitherto held the erroneous view that the provisions of Articles VI-XVI of the Constitution concern exclusively the supreme power and that nothing that concerns the supreme power permits the Diet's participation nor its representation. Since, however, the Diet holds the right to participate in state affairs, it may of course participate in the functions mentioned in Articles VI-XVI. The point is, not that these functions stand independent of the Diet's authority, but that they are performed without the Diet's consent. The view that the Diet cannot entrust these functions to other machineries, is also erroneous. Indeed there may be occasions in which they are entrusted to other

organs either because of their comparatively slight importance or out of urgent necessity, as, for instance, in the case of proclaiming the state of siege in an emergency, or because of some temporary cause on the part of the Tenno; but this cannot be interpreted as a violation of the Constitution. Only in principle have these functions to be personally performed by the Tenno.

The supreme power over state affairs covers a wide field, with all state affairs under its sway. It has authority among other things over (a) sanction and promulgation of laws (Constitution, Arts. V, VI), emergency Ordinances (*Ibid.*, Art. VIII), promulgation of independent orders and executive orders (*Ibid.*, Art. IX), and legislation, (b) organization of the Diet and opening and closing of its sessions (*Ibid.*, Art. VII), (c) official organization and appointment of government officials (*Ibid.*, Art. X), (d) organization of the Army and Navy (*Ibid.*, Art. XII), (e) diplomatic affairs (*Ibid.*, Art. XIII), (f) declaration of the state of siege, and (g) amnesty (*Ibid.*, Art. XVI).

SECTION III THE SUPREME POWER OVER THE IMPERIAL FAMILY

This is exercised with the advice of the Minister of the Imperial Household and permits no participation by the Diet. Expenses required for its exercise are to be defrayed out of the Imperial Household treasury.

Affairs of the Imperial Family chiefly consist of the personal affairs of the Tenno and members of the Imperial Family, but in reality they cover a wider field, being concerned not only with the Imperial Household itself but with the state and the people in their relation to the Imperial Family. Thus they concern, among other things, (a) succession to the Imperial Throne, (b) institution of a Regency, and (c) modification of the Imperial House Law—all these not being confined within the Imperial Household but being of such a nature as to affect the state and the people at large; while on the other hand some concern, (a) supervision of the Imperial Family, the Royal Family, peers, and Korean nobles, (b) the finances of the Imperial Family, (c) ceremonies in the Imperial Family, (d) social affairs such as relieving the poor, rewarding and aiding the destitute, besides the granting of audience and giving entertainment to foreign representatives and both native and foreign people, and (e) organization of the Imperial Court, and appointment and dismissal of court officials—all these being left to its discretion with no scope for interference by the state.

SECTION IV THE SUPREME POWER OF COMMAND

The supreme power of command is distinguished from the supreme power over state affairs, with actual usage and practical necessity in view, and stands independent of the functions of the Ministers of State. The "Commentaries on the Constitution of

the Empire of Japan" points out, with regard to the organization of the army and navy, that "this power is to be exercised with the advice of responsible Ministers of State," and, as to the supreme command of the army and navy, that "paramount authority in military and naval affairs is combined in the Most Exalted Personage as His sovereign power, and those affairs are in subjection to the commands issued by the Tenno."

We make a distinction between the supreme power of command over military affairs and that over state affairs simply because military movements require perfect freedom and secret tactics, permitting no restriction by outsiders. The supreme power of command over military affairs is, therefore, in principle only to command the army and navy and make them display their fighting strength. Unlike this supreme power of command, the supreme power of the organization of the army and navy is exercised with the advice of the Ministers of State.

SECTION V THE SUPREME POWER OVER SACRED RITES

This is the supreme power by which the Tenno holds ceremonies to pay homage to the spirits of the Imperial Ancestors, the successive Tenno, and all the gods of heaven and earth, as the highest master of sacred ceremonies. In ancient times religion and government went hand in hand, and government posts for taking charge of sacred rites

included the administration of state affairs. Then afterwards came the separation of religion from administration, giving rise to special posts for sacred rites. Ever since then sacred rites have formed part of the important matters over which the Tenno uses his supreme power, side by side with general affairs of the state and of the Imperial Family. Thus, whenever there occurs an important affair in the state or in the Imperial Family, the Tenno causes sacred rites to be held, by which He reports it to the gods. Not only on such occasions, but on certain fixed days of the year are these memorial rites regularly held. These sacred rites are under the supreme power of the Tenno, business concerning them being partly in the hands of the state and partly in the hands of the Imperial Family.

Here it may be added that when business concerning the maintenance and management of sanctuaries, appointment and dismissal of priests, and outlay for rites, is connected with the Imperial Family, it is handled by the Imperial Family, and when it is connected with the state, it is handled by the state. For instance, sacred rites held at the three Sanctuaries in the Court, viz., Kashikodokoro, Kōreiden, and Shinden and those held at Imperial mausolea are reckoned as affairs of the Imperial Family, and those held at the Imperial Shrines and other Shinto shrines are in the hands of the state.

The supreme power over sacred rites is exercised without the advice of the Ministers of State

or of the Minister of the Imperial Household when the Tenno personally presides over them. When a Regency is instituted, the Regent does not necessarily preside over them as proxy unless the Regency has been necessitated by some incapacity on the part of the Tenno and for no other reasons. In this case either the Regent or another member of the Imperial Family or the chief ritualist presides over them. When a Regency is instituted for a Tenno in his minority, the Regent is not empowered to preside over these rites as proxy.

SECTION VI THE SUPREME POWER TO GRANT MARKS OF HONOUR

Marks of honour are granted solely by Imperial favour and are subject to Imperial decision, the government having nothing to do with it. This supreme power is provided for in the Constitution together with the functions of that supreme power over state affairs as described in Article XV, thus: "The Tenno confers titles of nobility, ranks, orders, and other marks of honour." However, usage has established a distinction between this power and the supreme power over state affairs.

The marks of honour, according to the present system, are titles of nobility, ranks, orders, merit medals, and medals. The supreme power to confer marks of honour is differentiated from affairs of the Imperial Family and of the state, but the handling of business concerning the exercise of that

power belongs to the machinery of the state or that of the Imperial Family, thus matters relating to titles of nobility and rank being controlled by the Department of the Imperial Household and those relating to orders, merit-medals, and medals, by the Bureau of Decorations under the Cabinet.

SECTION VII DECLARATION OF A STATE OF SIEGE

"The Tenno declares a state of siege."^① By a state of siege is meant the safeguarding of the whole or part of the functions of ordinary laws of administration and the judicature by force of arms in case public peace and order cannot be maintained by these laws in time of war or of emergency. Conditions necessitating this state and its effect are provided by law.

By "conditions" is meant the time and area calling for such declaration and details incidental to it. By "effects" is meant the extent to which ordinary administration and the judicature are affected as the result of such declaration. The present Martial Law was promulgated by Ordinance No. 35 in the 15th year of Meiji (1882).

Declaration of a state of siege is originally under the supreme power of the Tenno, but the commanding officer of the place or of the fleet can declare it, only when it is impossible to ask for the Tenno's declaration, as a temporary measure to meet an exigency, as in the case of a domestic insurrec-

^① The Constitution, Art. XIV.

tion. Some hold the view that such delegation of the supreme power of the Tenno is impermissible, and argue that declaration of a state of siege by the commanding officer of an army or of a fleet is against the Constitution, but as already stated, the assumption that the supreme power can on no account be delegated is groundless.

A state of siege being the keeping of a close watch by force of arms in time of war or of an emergency, it is necessary to decide first what a war or an emergency is. Ordinance No. 37 of the 15th year of Meiji (1882) says: "Time of war shall be pronounced by an Ordinance in time of foreign complications or of domestic insurrections." From this we know that the term "time of war" means the state of the country when it is in war with another country under international law, and the term "emergency" means the state in which public order cannot be maintained by police force alone.

The area to be kept under strict guard in time of war or of an emergency is called a war zone, and the area to be kept under strict guard in time of siege or aggression by an enemy or of a like emergency is called a siege zone. Within a war zone, administrative and judicial affairs are, in so far as they are concerned with military matters, left under the charge of the commanding officer of the place, while within a zone of siege all affairs, both administrative and judicial, are placed under the authority of the commanding officer of the place.

Within an area where a state of siege prevails all laws on the liberty of public meetings and associations, the liberty of abode and of changing the same, the inviolability of abode and of the right of property, and the secrecy of letters, are temporarily suspended and the people must obey the orders issued by the commanding officer.

Operation of a part of the Martial Law is not the declaration of a state of siege. For example, a part of the Martial Law was put in effect for the preservation of public peace when citizens of Tokyo started riots on September 6 in the 38th year of Meiji (1905) because of their acute dissatisfaction with the Russo-Japanese peace treaty, or when riots were caused in Tokyo and neighbouring prefectures at the time of the Great Kwantu Earthquake in September of the 12th year of Taisho (1923).

The right to declare a state of siege, it may be pointed out, belongs to the supreme power of the Tenno, and so it can be declared by the supreme power of command. In cases such as are stated above, however, there is no other way than to declare a state of siege by a law or an emergency ordinance, for in the absence of sufficient conditions requisite for a state of siege, the same effect as a declaration by the Tenno must be secured and certain restrictions must be placed upon ordinary laws. That is the reason why in the above two cases declaration of a state of siege was made by an emergency ordinance.

In England, on the contrary, the political position

of the King is made almost clear by the three main principles upon which the system of government rests. That is, the Sovereign is irresponsible, but Ministers are responsible to Parliament for the exercise of every prerogative, and it is the right and duty of Parliament to enquire into the way in which Ministers exercise the prerogative and approve or condemn the mode of exercise. The King enjoys the name of crowned head of monarchy together with the status which goes with it and the prerogatives which go with that status, i. e. personal prerogatives. Thus he is in form the one in whom are combined the rights of sovereignty and the highest organ of the state. However, very few of the prerogatives relating to government can be exercised without Parliament's consent, the rest being exercised through administrative organs subject to certain restrictions. To be more exact, the King exercises the administrative power with the advice of the cabinet and the ministers of administrative departments, the legislative power with the consent of Parliament, and the judicial power through the medium of courts of justice. Therefore only in the sense that, considered from a purely legal standpoint, all these powers—legislative, judicial, and administrative—are exercised through the King's will, can he be called the highest authority in the state.

There was a controversy of many centuries' standing as to which of the two should govern, the King or the people, furnishing English history with

accounts of changes in the drift of controversy, of reconciliations, and of failures. As early as in 1215, barons under arms forced the King to put his signature to the Magna Carta. Later by degrees the political powers of the people extended until in 1376 a new system of impeachment was instituted as a means of preventing the King's absolutism. The Revolution of 1688 gave birth to the Petition of Rights and the Bill of Rights, the actual power of administration being restored to Parliament. The King's prerogatives of pardon and of suspension, and the High Court of Justice and other similar courts which oppressed the people were declared to be unjust and harmful; besides taxation without Parliament's consent, maintenance of a standing army in peace time, severe monetary penalties, and such other illegal acts of the king were finally abolished. Moreover, Parliament was convoked more frequently than before, the government's interference in elections was abolished, and the privileges of members of Parliament were guaranteed. For all this, the King still possessed as supreme head of the Church not only the administrative and legislative prerogatives as before the Revolution, but the supreme power regarding all matters, both political and religious.

Then afterwards the centre of government gradually shifted from the King to Parliament until at last there arose a situation in which the King reigned but did not govern. Parliament was victorious in the mighty struggle for possession of the sover-

eign power, in consequence of which the executive which the King represented was unable to stand up against the legislature. Here we cannot overlook two kinds of prerogatives formally belonging to the Crown, one being the personal prerogative properly and exclusively his own, which no one can restrict or venture to question or check him in its exercise, and the other being the power vested in the King by Acts of Parliament. Besides these, Parliament sometimes vests the King with powers necessary for the performance of state duties.

Except those above mentioned there is no power properly and exclusively possessed by the King. All ordinances are issued with the consent of the Cabinet, without which no sovereign power can be exercised. Even when the King wants to appoint his secretary or choose an official in charge of his bedchamber, he must ask for instructions from the Cabinet if such a desire of the King is considered to have any bearing upon state administration. The English proverb says: "The King can do no wrong."^① It shows in fact the King's incapacity for administration. For the King's political actions, the Cabinet alone is responsible.

The King can appoint Ministers, but not of his

^① The personal prerogatives still exist, and to some extent inevitably overlap with the political. (a) The King can do no wrong. (b) The King never dies. (c) Lapse of time does not bar the right of the Crown. (d) Where the title of the King and that of the subject clash, the King's title must be preferred. (e) The King is not bound by statutes unless named therein. (f) The King is never an infant.

own free will. He must first appoint the leader of the majority party in the House of Commons to the post of Prime Minister and then appoint other Ministers on the recommendation of the former. Ministers are, therefore, appointed practically by the House of Commons. Laws require the King's signature, but since 1707 no bill that passed both Houses has ever been vetoed by the King, which fact is sufficient to stamp as fictitious and tricky the view that the legislative power is the prerogative of the King. According to usage, the King is prohibited from entering either House except when formality so requires. The King has been called the fountain of honour from ancient times. He confers titles of nobility, knighthood, and orders, but, in fact, the right to confer those honours is held in the hands of the Prime Minister. The King has the supreme command of the army and navy, but the real power is exercised over them by responsible Ministers of State under the supervision of the Prime Minister, whereas in Japan the Tenno has personally the supreme command of the army and navy as Generalissimo and permits no interference by the Cabinet. The King enjoys various honours in order to give expression to his noble position and exalt his dignity as personal privilege appertaining to the status of the King. Thus the King is known by the long style and title, viz., "King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, De-

fender of the Faith, and the Emperor of India." Besides the King possesses the right to use the Royal Standard, to be escorted by guards of honour, and to receive a national salute of guns.

In medieval times the King was called the fountain of justice, because he personally heard cases brought by his people and sent judges to correct their crimes. Trials are now conducted in the name of the King, but the King has not the real power to judge, it being in the hands of judges appointed by the Prime Minister or the Minister of Justice. The King also possesses for form's sake the prerogative of granting pardons, but in reality the Minister of Home Affairs makes investigations and decisions and reports the results to the King. It has been said that the King does no wrong legally, and, indeed, he is neither sued nor punished, but he must obey the action of Parliament reasonably taken against any illegal act on the part of the King. In civil affairs the King is sometimes proceeded against like an ordinary man, in which case, however, permission to that effect must first be obtained from the King. In Japan the Tenno is sacred and inviolable; accordingly he is not responsible for any penal and civil affairs. Should anybody ever want to call the Imperial Family to account, he must proceed against the Minister of the Imperial Household or a court official as his proxy.

In ancient times the King could dispose of diplomatic affairs as he pleased, but this prerogative, too,

has gradually been reduced with the extension of civil rights until now it has passed into the hands of the Cabinet. The King can, however, claim the right to be consulted by the Cabinet, censor all correspondence, and express his opinion. In time of war the King can issue not only Royal Ordinances on blockade of trade, contraband of war, etc., but also legal ordinances on public health and education, by virtue of such power specially vested in the King by Parliament. The Church of England is under the command and supervision of the King on the basis of the unity of church and state, although this has not been made a part of the King's prerogatives by any ordinance of Parliament. Thus the King appoints bishops as spiritual overseers and exercises various other religiously important powers. As may be expected, he can also be a member of any denomination except the Roman Catholic.

As stated above, the King of England can only exercise limited powers, but he is looked up to as the incarnation of the reverence, the interests, and the ideals of the people, the latter being attached and loyal to the King to a marked degree. The King does not express his views nor show political favouritism, remaining entirely aloof from political strife, however furious party controversies may be, or however bitter may be the adverse criticism directed against him. After all, the King reigns, but does not govern.

The political position of the President of France is very similar to that of the King of England. In-

deed they are each head of the state, but neither of them governs. One difference is that while the former does not reign, the latter does. Another difference is that while the office of the former is temporary and elective, that of the latter is permanent and hereditary. On this point Henry Maine points out that in ancient times French kings reigned and governed, that constitutional sovereigns reign but do not govern, and that the President of France^① neither reigns nor governs. The President of the United States of America stands on quite a different basis, for he is not altogether an impotent manikin. Far from it, his indirect influence on the administration, the esteem of the people, and the position he occupies as the central figure of the United States, are not to be trifled with, although he can not exercise very great power.^②

^① The powers vested by the French Constitution in the President being very strong and extensive, he is, on the face of the provisions of the Constitution, very like the leader of administration, i. e. the Sovereign of the country. See Art. III on the Organization of the Public Powers and Arts. VIII, IX, XII, on the Relations of the Public Powers. With regard to legislation, See Arts. III, V, on the Organization of the Public Powers; *Constitutional law, revised 1884*; Arts. VI, VII, on the Relations of the Public Powers.

^② The President of the United States possesses all executive powers delegated by the sovereign, i. e. the people, therefore, he exercises control over state affairs in the same position as the sovereign of a monarchy. It is limited in two particulars: he can not grant reprieves or pardons in cases of impeachment, and he solemnly swears or affirms faithfully to execute the office of President of the United States. The executive power of the President is provided for in the Constitution. See Art. II, Section II and III.

CHAPTER X

THE LAW RELATING TO SUCCESSION TO THE IMPERIAL THRONE

S the Throne must not be left unoccupied, even temporarily, there must be some provision for immediate succession in case of the demise of the Tenno. In former days, when public laws were not well developed, succession to the Throne was regarded in the same light as succession in civil law. It must be noted that succession to the Throne is neither succession to the family headship nor inheritance of the estate as prescribed by civil law: the Tenno ascends the Throne automatically according to national law. He does not succeed to the Throne in the sense of inheriting it from the former Tenno.

In England the title to the Crown in the time of the Saxons was decided by election, quite unlike the Imperial Throne of Japan, which is transmitted in an ever-unbroken line. After the Norman conquest the title gradually came to be transmitted by heredity, and it became the custom for a blood relative to the former King to succeed to the Crown. It was not until the thirteenth century that the principle was established of succession to the Crown of the eldest child of the deceased King's family. The provisions for succession to the Crown in the

present Royal House of Hanover chiefly consist, as above stated, of the Act of Settlement enacted in 1701 and are supplemented by the fundamental principles of the law of succession in common law. These are all ordinary laws, so they can be easily modified.

In Japan succession to the Throne is provided for in the Imperial House Law, which says that the Imperial Throne of Japan shall be succeeded to by male descendants in the male line of Imperial Ancestors.^① As to who is to have the right of succession among those entitled to the Throne, the law provides against possible complications as follows.

(a) On the demise of the Tenno, the Imperial Throne is succeeded to by the Imperial eldest son. When there is no Imperial eldest son, the Imperial Throne is succeeded to by his descendants, that is, those in his line. (b) When there is no survivor in the line of the Imperial eldest son, the Imperial Throne is succeeded to by the Imperial son next in age and by his issue. That is, the one belonging to the senior line succeeds to the Imperial Throne.^② (c) Among the Imperial descendants of the same degree one of full blood has precedence over descendants of half blood for succession to the Imperial Throne.^③ (d) When there is no Imperial descendant to the demised Tenno, the Imperial Throne is succeeded to by an

^① The Imperial House Law, Art. I.

^② The principle of primogeniture.

^③ The Imperial House Law, Art. IV.

Imperial brother and one of his descendants. When there is no such Imperial brother or descendant of his, the Imperial Throne is succeeded to by an Imperial uncle and one of his descendants. In this case precedence is given to the one nearest in degree. The degree is calculated in the same way as in civil law: the Imperial brothers are of the second degree, the Imperial uncles, of the third, and the Imperial great-uncles, of the fourth.^①

The fundamental principles of succession to the Crown in England are: (a) The successor to the Crown must be the Electress Sophia^② of Hanover and her issue. (b) The descendants of Sophia who are to succeed to the Crown must be descendants by birth and not by adoption. (c) The successor must, likewise, be a child of full blood, that is, the descendant born by a legal marriage in conformity to common law and the Royal Marriage Act. (d) The successor to the Crown is to be in communion with the Church of England. (The Imperial House Law of Japan does not provide for such religious restrictions.) (e) The order of succession is decided in accordance with the principle of primogeniture as in Japan, and the eldest son and his descendants come first. The order of succession among the rest

^① The Imperial Relative Act, Art, IV, Cl. II.

^② The Electress Sophia was a daughter of Queen Elizabeth, who married into the House of Hanover and became the first Queen of the Hanoverian Dynasty from which the present Royal Family has descended.

of the Royal Family is based on the fundamental principle of succession in common law. (f) Among members of the same line the male takes precedence over the female. (g) When the Crown is succeeded to by those in a collateral line, the paternal takes precedence over the maternal. In short, the order of succession is nothing but an adaptation of the fundamental principle in common law which is to be observed by the people in general, and nothing is specially provided for the Royal Family.

Though the order of succession to the Imperial Throne is, as above stated, definite and immovable in Japan, the principle may be altered in case of a special exception. Thus (a) when the Imperial heir is suffering from an incurable disease of mind or body, or when any other weighty cause exists, the order of succession may be changed in accordance with the foregoing provisions, with the advice of the Imperial Family Council and with that of the Privy Council.^① Or (b) when the Imperial heir is missing for three years, his disappearance shall be adjudicated according to the Imperial wishes, and he shall be counted as dead at the expiration of that term.^② When the fact of his existence is made clear after his disappearance has been adjudicated, the adjudication must be cancelled according to the Imperial wishes, but when succession to the Imperial Throne

^① The Imperial House Law, Art. IX.

^② The Imperial Status Act, Arts. XXI and XXII.

is necessitated before that cancellation, the candidate next in the order of succession ascends the Throne as the Imperial heir and no alteration is made on account of the cancellation.

At this point the question arises as to the procedure when the Imperial son is unborn at the time of the demise of the Tenno. Opinions are divided on this point. Some scholars maintain that in such a situation the holder of the right of succession to the Imperial Throne should wait for the birth of the Imperial infant without ascending the Throne and that when the infant is male, he should ascend the Throne simultaneously with his birth, but that when the infant is female or still-born, the male member of the Imperial Family nearest in order should ascend the Throne without delay as having been on the Throne since the demise of the preceding Tenno. According to this opinion, the Throne is left vacant for a while, which is contrary to Article X of the Imperial House Law, which reads: "Upon the demise of the Tenno, the Imperial heir shall ascend the Throne." A more satisfactory opinion is that the holder of the right of succession should himself succeed to the Throne immediately. But it is open to doubt as to whether or not he should abdicate in favour of the male Imperial child. However, abdication, not being recognized under our national law, the Imperial son thus born must be justly said to be without the right of succession.

In England there are three causes of succession to the Crown: (a) demise, (b) abdication, and (c) dethronement. Abdication affects in no wise the rights of the successor to the Crown, but when a ruler wishes to abdicate, the provisions of the Act of Settlement must be amended in accordance with the statute. It has hitherto been the custom for dethronement to assume the form of abdication.

In Japan, when the Tenno ascends the Throne, sacred rites are performed at the Kashikodokoro (賢所) the Imperial Sanctuary—and accession to the Throne is reported to the Kōreiden (皇靈殿) and the Shinden (神殿), a new era being inaugurated under a new era name. On this occasion the Tenno accepts the Divine Treasures handed down from the Imperial Ancestors. The name of an era remains, according to the provisions of Article XII of the Imperial House Law, unchanged during the whole reign of a Tenno, and this has been the rule since the 1st year of Meiji (1868). Upon a new Tenno's accession to the Throne, a new era will be inaugurated, and the name of it will remain unchanged during the whole period of his reign, in agreement with the established rule of the 1st year of Meiji.^①

After the Tenno's accession, the ceremonies of enthronement and a Grand Enthronement Banquet (Daijosai) are held in Kyoto. The enthronement ceremonies are, indeed, imposing ones, they are

^① The Imperial House Law, Art. XII.

divided in two parts, a ceremony in front of the Kashikodokoro and one at the Shishinden Hall (紫宸殿), the former being a ceremony at which the Tenno personally reports His accession to the Throne to the Imperial Ancestors in front of the Kashikodokoro, and the latter being one at which the Tenno summons the members of the Imperial Family, all his near subjects, and envoys from foreign countries, and proclaims His accession throughout the world. The Grand Enthronement Banquet is a sacred rite performed soon after the Tenno's accession to the Throne to invite and entertain the spirits of the Imperial Ancestors and the heavenly and earthly gods with rice newly harvested.

The accession to the throne of the King of England is solemnized first by proclaiming the new King in the names of the Privy Councillors, members of the Municipal Assembly of London, members of the House of Lords, etc., who are summoned immediately after the death of the preceding King, followed by the taking of the oath by which the new King guarantees the position of the Church of England. Then comes a coronation corresponding to the enthronement ceremonies of Japan, at which the King proclaims his accession to the world and takes the oaths to rule over his country in accordance with the statutes of Parliament and to believe in and guarantee the spiritual authority of the Church of England. Sovereigns of such monarchies as Japan and England succeed to the throne from

generation to generation, while in the United States^①,

- ① The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of the number of votes for transmit sealed to the seat of government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

If, at the time fixed for the beginning of the terms of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of

France, and Germany, whose national structure is founded on so-called democratic republicanism, the President becomes head of the state as the representative agent of the people.

In France, unlike other republics, the President acquires his status as such by being elected by the National Assembly. The reason for this is to guard against unhappy possibilities such as the absolute monarchy which emerged when Napoleon III., elected President by a plebiscite, finally established himself as Emperor. Provisions for this purpose are made in the Organization of the Public Powers enacted in 1875.

The President of the Republic shall be chosen by an absolute majority of votes of the Senate and Chamber of Deputies united in National Assembly. For this purpose one month at least before the legal expiration of the term of office of the President of the Republic, the houses shall be called together in National Assembly to proceed to the election of a

his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

new President. In default of a summons, this meeting shall take place, as of right, fifteen days before the expiration of these powers. In case no candidate wins a majority of votes, then final voting will be repeated again and again until some candidate commands a majority. This method of election by both Houses is under the absolute control of the National Assembly, and yet it has one merit in that it is carried out far more speedily than a plebiscite.

CHAPTER XI

REGENCY

THE Tenno is sometimes incapable of personally administering the country. Against such a contingency a certain substitute organization is necessary for keeping up the will of governing the country; in other words, there must be an agency for the exercise of the supreme power on behalf of the Tenno. The agency thus instituted is a Regency, and whoever performs this office is a Regent. The Regency is instituted neither in conformity with the will of the Tenno, nor is the Regent appointed by the Imperial Family Council or the Privy Council. The Regency is legally necessitated in a certain case, and the Regent is capable of all state acts performed by the Tenno. The Regent can exercise the supreme power in the same form and with the same effect as the Tenno. As regards a Regency there is one exceptional rule provided in Article LXXV of the Constitution: "No modification can be introduced into the Constitution or into the Imperial House Law, during the time of a Regency." This is due to the conviction that the foundations of the state and of the Imperial Family are too important to be justly altered by any other means than Imperial decision.

Although a Regent is entitled to exercise the

supreme power vested in the Tenno, he is not allowed to exercise the special rights belonging to the Tenno himself. He is not to be called to account for his acts under national law, for which Ministers of State should shoulder the responsibility. Since the Regent thus exercises His supreme power for the Tenno, his influence must be said to be far-reaching. Accordingly, as is provided in Article XIX of the Imperial House Law, a Regency is instituted only "when the Tenno is a minor," or "when He is prevented by some permanent cause from personally governing." "By some permanent cause" is meant a case where there is no possibility of recovery from a serious disease or feebleness of mind or a serious physical defect by which the Tenno is prevented from governing personally. According to the provisions of the Imperial House Law, decision as to whether or not a Regency ought to be instituted is made by the Imperial Family Council and the Privy Council. In England, too, the fundamental principle is that the King should personally exercise the sovereign power as head of that monarchical state, and, if his personal government is impossible, a regency should be instituted. But there is no provision corresponding to the Imperial House Law of Japan, a statute being enacted whenever a Regency becomes a necessity. Such a statute may be of two kinds, one being a statute of Parliament based upon the King's will and the other a statute enacted at the discretion of Parliament regardless of the King's will.

In England, a regency is necessitated (a) when the newly crowned King is a minor, (b) when the King is prevented from personally governing by some serious disease or deformity of mind or body, and (c) when there is no possessor of the right of succession at the time when the Crown should be succeeded to. The first and second cases are common to Japan, but the third case could never arise. In Japan, a member of the Imperial Family alone is eligible for the Regency. In ancient times Jingu Kōgo[®], Prince Umayado, and Prince Nakano-Ōye who assumed the Regency respectively were all members of the Imperial Family, but later Yoshifusa Fujiwara for the first time assumed the Regency as a subject, thus creating a precedent. The Imperial House Law requires departure from such precedents and return to the ancient custom. In consequence no subject can now assume the Regency. However, it does not follow that any member of the Imperial Family can assume the Regency. The Regency, according to the Imperial House Law, goes only to (a) the Kotaishi, i. e. the heir-apparent to the Tenno, (b) the Kotaison, i. e. eldest grandson of the Tenno when there is no heir-apparent, and (c) a male member of the Imperial Family above his majority in case there is neither Kotaishi nor Kotaison or in case neither the one nor the other has arrived at his majority, in the same order as that of succession to the Imperial Throne. In case there should be no

[®] *Kōgo* (皇后) is the Japanese for *Empress*.

male member at all, the Regency is assumed by (a) the Kogo, (b) the Kotaigo^①, (c) the Grand Empress Dowager, and (d) an Imperial Princess or a Princess. An Imperial Princess or a Princess can assume the Regency only when she is without consort.

^① *Kotaigo* (皇太后) is the Japanese for *Empress Dowager*.

PART IV
THE OBJECT OF GOVERNMENT
CHAPTER XII
THE SUBJECT AND THE NATION

SECTION I THE NATURE OF THE SUBJECT
AND THE NATION

HE people, collectively, are called a nation in their relation to the state, and, in a monarchy, are called the subjects in their relation to the sovereign. In a republic, where the existence of a sovereign is out of the question, the people are simply such in name, and, collectively, a nation. The status in which one is a member of a nation is called one's nationality.

A subject is a natural man who is as a matter of course in a status to obey the sovereignty of the state. A foreigner coming within the territory of the said state must also be subject to the same sovereignty, but this is based on the fact that he is a resident in that territory, and therefore it differs from the case of a subject who obeys the sovereignty for no such special reasons. The words "as a matter of course," therefore, imply that a subject obeys the sovereignty unquestioningly, unconditionally, and for no special reasons. A subject is thus under obligation to obey the authority of the state

to which he belongs. The state can therefore give any kind of order to a subject when it goes through certain fixed formalities, while a subject stands in a position where he must absolutely obey that order. The absolute obedience here referred to does not mean obedience to illegal exercise of the power, a subject on his part being under no obligation to accept the exercise of the power if it is not in conformity with the formalities established by the constitution.

SECTION II NATIONALITY

ARTICLE I ACQUISITION OF NATIONALITY

The Japanese Constitution provides in Article XVIII: "The conditions necessary for being a Japanese subject shall be determined by law." This means that the determination of the conditions for being a Japanese subject is established according to the provisions of law, and that it is not to be left to casual rules made by means of an order. The Law of Nationality enacted in accordance with the above provision of the Constitution has adopted the following principles as the basis of the determination of nationality. (a) Birth. To regard any person born in the territory of a state as a member of that nation irrespective of parentage, viz. the territorial principle, would in many cases go against human nature, while a compromise between that and the parentage principle, viz. determination of nationality according to parentage irrespective of the country

of birth would be much more natural, and in fact this latter system is adopted in many countries. The Law of Nationality of Japan has adopted the parentage principle, tempered by the territorial principle.

(a) When a child's father is Japanese at the time of its birth, it shall be Japanese, and the same holds when a child's father who died before its birth was Japanese at the time of his death. (b) When a child's father, not Japanese by birth, who acquired Japanese nationality by marriage into his wife's family or by adoption into a Japanese family, loses his nationality due to divorce or being disowned from adoption, before the birth of the child, then the nationality of the child shall be determined according to the father's status during the mother's pregnancy. (c) In the case of an illegitimate child or a child born of parents without registered domicile, it shall be determined as Japanese, provided the mother is Japanese. (d) A child whose father cannot be identified because of desertion, or one born of parents without nationality, shall be determined as Japanese, provided it was born in Japanese territory. This last is the case usually called the acquisition of natural nationality. In England, the territorial principle pure and simple was originally adhered to, it being the rule that any and every child born within English territory was English as a matter of course. Later, by the revision of the Act of 1870, it was established that the nationality of a child born of a foreign father in English territory be

determined according to the laws of the father's native country; and as to a child with an Englishman as a father born in a foreign country, the choice was granted the child when it attained its majority as to whether or not it would assume English nationality. Thus the present rule is a compromise between the territorial and the parentage principle. In the United States, the Amendments of the federal constitution provide in Article XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This provision is clearly based on the territorial principle, which determines that every child born in the United States is an American, irrespective of lineage. All Japanese born and resident in the United States have United States nationality according to the federal constitution, except those whose registration of birth was accompanied by an expression of intention to reserve Japanese nationality. The same is the case with those born in Argentine, Brazil, Canada, Chili, and Peru.

(b) Recognition. A child recognized by its father or mother, who is Japanese, as his or her own acquires Japanese nationality^①.

(c) Marriage, Marriage into the Wife's Family, and Adoption. A foreigner who becomes the husband of a Japanese or who marries into his Japanese wife's family or is adopted by a Japanese family acquires Japanese

^① The Law of Nationality, Article VI.

nationality. (d) Naturalization. By naturalization is meant the granting of Japanese nationality to a person of foreign origin by means of administrative procedure. The conditions requisite for this are (a) that he or she has been a resident in Japan for more than five consecutive years, (b) that he or she be more than full twenty years old, being competent according to the laws of his or her native country, (c) that he or she has good moral conduct, (d) that he or she has means or vocational capacity adequate for making an independent living, and (e) that he or she has been without nationality or shall have lost his or her previous nationality by the acquisition of Japanese nationality. In special cases, such as when a person has a Japanese father or mother and has his domicile in Japan, a reduction may be made on the above conditions.

ARTICLE II LOSS AND RECOVERY OF NATIONALITY

According to the Law of Nationality of Japan, denationalization occurs to any person (a) when he or she has acquired foreign nationality by marriage with a foreigner or consequent upon divorce from a foreigner, (b) when he or she has acquired foreign nationality, (c) when she has acquired the nationality of her husband or of her parents, (d) when he or she has been recognized by his or her parents, who are foreigners, as their own; etc. Even in these cases, a male person more than seventeen years old does not lose Japanese nationality when he is in

military or naval service, or unless he is under no obligation to enter such service. Nor does any person in the civil or military service of Japan lose Japanese nationality unless after he has lost his post. The term *recovery of nationality* refers to the recovering of Japanese nationality by a natural born Japanese after once he or she has lost it. In recovering nationality, as in the case of naturalization, the permission of the Home Minister is required, the only condition being that he or she has a domicile in Japan. In the case, however, of loss of nationality by a naturalized person or a child of the same who acquired Japanese nationality, or by any person who acquired Japanese nationality by marriage into his wife's family or adoption, Japanese nationality cannot be recovered except by the procedure for naturalization.

CHAPTER XIII

THE RIGHTS AND DUTIES OF SUBJECTS AND PEOPLE

SECTION I THE RIGHTS OF SUBJECTS AND PEOPLE

HE fundamental essence of constitutional government consists in the guarantee of the people's liberty side by side with the system of government based upon the independence of the three powers. The provisions under the title "The Rights and Duties of Subjects," Chapter II of the Japanese Constitution, exclusively concern the right of liberty. As has already been said, the status of subject and citizen in every country consists of obedience to the sovereign power. In the Japanese Constitution, therefore, provisions are made for the more important duties of the subjects together with the rights corresponding to them, in order to make the subjects fulfil their duty of obedience. The rights of the subjects exist only when the national law grants and recognizes them. The most important of the rights of the subjects is the right of liberty, and second in importance are the right to claim action and suffrage.

By the right of liberty is meant a right recognized by the Constitution, by providing that it shall not be dictated, prohibited, or restricted except by

a fixed formality, i.e. law, or unless it coincides with certain conditions. The granting of this right by the Constitution may be traceable to the fact that, although in fact the sovereign power, originally possessed with unlimited authority of order and prohibition, can by itself sufficiently attain the object for which the state exists, it is sometimes more effectively and more suitably exercised when a fixed formality or condition is strictly observed according to the nature or history of the matter in hand. It is, indeed, for this reason that in the constitutions of other countries is also recognized this right of liberty under the appellation of the fundamental or the national right.

The Constitution provides that actions done by man in social life, such as speech, writing, public meetings and associations, religious belief, abode, change of the same, etc., cannot be dictated or prohibited unless they contravene certain formalities or coincide with certain conditions; and this all because they serve as the important foundation of the advance of civilization. In short, the right of liberty is but a restriction imposed upon the state organ. Considering, however, that a right is, from a legal point of view, a will power capable of claiming interests and, in its relation to public law, is a public right, it is not at all unreasonable to regard the right of liberty as such. For, indeed, by this right a subject can claim non-action from an administrative office to prevent the possible illegality of imposing restrictions on any

action by means of administrative measures, instead of observing fixed formalities or conditions, or by arbitrary means, without sufficient reasons. Thus the right of liberty may be interpreted as a sort of subjective right granted to the subjects and the people.



SECTION II · DIFFERENT SIDES OF THE RIGHT OF LIBERTY

The right of liberty provided for in the Japanese Constitution concerns the following particulars. (a) The liberty of abode and of changing the same. Article XXII of the Constitution provides thus: "Japanese subjects shall have the liberty of abode and of changing the same within the limits of law." By abode is meant living in a place of shelter, i.e. a dwelling place which is the centre of living. (b) Personal liberty. Article XXIII of the Constitution provides thus: "No Japanese subject shall be arrested, detained, tried or punished, unless according to law." Here *to arrest* means "to put personal liberty under control all at once" or "to take into custody at some place," and *to detain* means "to keep in temporary custody at a fixed place." *To try* means "to examine and question about a case," and *to punish* means "to inflict a penalty on a criminal" or "to discipline an offender against laws and regulations." This last refers to punishment by police and by judicial authorities. (c) Liberty enjoyed in the secrecy of letters kept inviolate. The Constitution provides in Article XXVI thus: "Except in

the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate." By this is given a guarantee of the secrecy of all correspondence between Japanese subjects, intentional violation thereof being prohibited by law. By *letters* is meant "written communications," whether they may be entrusted by the writers to others for conveyance or they may be borne by the writers themselves, whether they may be during transmission or they may still be in the writers' hands, not to speak of those already in the recipients' hands. The term *secrecy of letters* points to the condition of letters whose contents are beyond perception in outward appearance, and therefore it is right to interpret the term as referring to sealed communications. As to whether a telegram or a telephone message can be included in letters, opinions are divided. A telegram may be regarded as a letter as it remains in the state of a sealed communication, since it is a written communication that is proof against disclosure. As to a telephone message, which cannot be a written communication, it does not come within the scope of the guarantee of secrecy.

(d) Liberty enjoyed in the inviolability of the right of property. The Constitution states in Article XXVII thus: "The right of property of every Japanese subject shall remain inviolate. Measures necessary to be taken for the public benefit shall be provided for by law." Violation of a subject's right of property and of disposition by administrative measures must

by all means conform to the provisions of law and be conducive to the public benefit. (e) Liberty of religious belief. Article XXVIII of the Constitution states thus: "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief." This is a guarantee of liberty to believe in any religion. The religious belief of an individual is a psychological action, pure and simple, and therefore there is no room for interference. The only point susceptible to legal discussion is its external effects. The term *freedom of religious belief* includes not only liberty in the choice of religions and in conversion, but liberty in professing a religion or in being without religion, free from any compulsion to worship according to other religions. To foreigners the same principle is applied, but they have no guarantee under the Constitution, and therefore the government can expel them from the country at any time, except when they come within the special provisions of international treaties. (f) Liberty of speech, writing, publication, public meetings and associations. The Constitution provides in Article XXIX thus: "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations." This is a guarantee of freedom to express thought and to hold meetings and organize associations. By *speech* is meant "expression of thought by means of lectures, speeches, or conversation"; by *writing* is meant "ex-

pression of thought by making books and pictures"; by *publication* "expression of thought by producing and distributing large numbers of the same writings by means of lithography, woodblock printing, type-printing, and other mechanical or chemical processes"; by *meetings* is meant "the coming together of many persons with the object of expressing thought"; by *associations*, "organized bodies of persons with the object of the expression of thought, whether on politics or on public affairs." The Constitution thus recognizes the liberty of the subjects in their expression of thought, but it does not grant such liberty to those having unpatriotic and other ideas prejudicial to the safety of national life, by being feeble-minded and unsound in thought. Law can put restraint on such persons. (g) Liberty enjoyed in the inviolability of dwellings. The Constitution states in Article XXV thus: "Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent." This is a guarantee of the safety of abode of the subjects. No house can be entered without the consent of the occupant. Even when such consent is obtained, no search can be conducted without consent to that effect. The term *dwelling* in the above article does not necessarily mean places of abode mentioned in the Civil Code, but, in a wider sense, any and all places where man takes shelter. It need not necessarily be a permanently established centre of living, but it may be a room in a hotel, where the traveller settles

himself temporarily, so long as it is a place affording protection to the body and safety to life.

The different rights thus far enumerated are the different sides of the right of liberty, of which the underlying spirit constitutes the foundational essence of modern constitutional government. In England, the United States, France, Germany, and every other constitutional country is the same right of liberty granted to the people by means of constitutions or constitutional laws, although, indeed, the words of their provisions vary. The earliest provisions for the right of liberty are found in the Declaration of the Rights of Man.^① It was led in England by the Magna Carta of 1215, followed by the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689, in all of which is guaranteed, though in part, the right of liberty of the people. This guarantee is significant in that the Crown was made to take that step by pressure brought to bear upon the despotic rule unjustly and unreasonably imposed upon the people by the successive kings. A brief survey of the paragraphs in the latter three relating to the right of individual liberty will interest the reader. Since the Norman Conquest it became the practice of the successive kings of England, in

^① This Declaration of the Rights of Man is one of the most notable documents in the history of Europe. It not only aroused general enthusiasm when it was first published, but it appeared over and over again, in a modified form, in the succeeding French constitutions down to 1848, and has been the model for similar declarations in many of the other continental states.

raising war funds, to levy taxes not only upon the lords but upon the people in general. These taxes were known as the Compensatory Tax for Exemption from Service and Tributes. In 1215, during the reign of King John, however, the lords found themselves no longer able to bear such high-handed injustice, and presented a petition to the king, who was made to sign it as a promise to refrain from any more such irregularities. This is the well-known Magna Carta, or the Great Charter, in which is found the following paragraph relative to individual liberty. "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." This is a guarantee of the personal liberty of citizens, the freedom and inviolability of the right of property, and the freedom of abode, corresponding to the provisions of Arts. XXII, XXIII, and XXVII of the Japanese Constitution.

Later, in 1628, Parliament presented to King Charles I. what is known as the Petition of Right, which contained the requests (a) that arbitrary arrest and detention in prison of citizens by Royal order instead of by proper legal measures or by law be abolished and (b) that no army soldiers be quartered in the home of a citizen without his consent or against his wishes. This, again, is a guarantee of the right of liberty of the people. Lastly, in 1679, the Habeas

Corpus Act was passed as a perfect guarantee of the right of individual liberty. The significance of this act is seen in the fact that it re-confirmed the principle, first confirmed by the Magna Carta, that all arbitrary arrest should cease and that a simple and easy means was devised for testifying to the fact of illegal arrest and detention in prison. This act forever put an end to the practice of arbitrary imprisonment by a despotic king and his officials.

It will be recalled that the strife between the King and his subjects brought about the revolution of 1688, followed by the abdication of James II., and lastly the passage of the Bill of Rights (1689). By this Bill of Rights was proclaimed the supremacy of the people and of government by their representatives. To be precise, the right of claim by means of the royal prerogative was once and for all annulled with special regard to (a) suspension and abolition by the King of laws without the consent of Parliament, (b) exaction of money by means of the royal prerogative, (c) interference in the right of claim, and (d) the raising and keeping of a standing army at home in peace time. As the result, the freedom of election of Parliamentary members, of speech and conduct in Parliament, and of frequent convocation of Parliament in order to revise, strengthen, and preserve the laws was firmly and permanently established. The object herein aimed at perfectly coincides with that of the first eight Amendments of the Constitution of America. The original clauses say, in effect, (a) that it is the right

of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal, (b) that the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law, (c) that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted. In England, there is no provision in the constitution regarding the freedom of speech, publication, meetings, and associations. It is not because these rights are not recognized there, but because they are widely recognized as part of the unwritten law.

It may be noted that whereas in England the provisions relative to the right of liberty take the form of a promise extorted from the King in order to protect the people against the despotism of the former, viz. a set of regulations determining the rights of the King, in the United States they are incorporated in the Federal Constitution in clear and most solemn terms as a declaration of a right inherent in man. Those provisions are, in order, as follows. (a) "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This is a guarantee of the freedom of religious faith, speech, publication, meetings, etc., and corresponds to the provisions of Articles XXVIII and XXIX of the Japanese Constitution. The right of claim

for relief of calamities and disasters is a privilege common to the free people of every country, and just as in the Bill of Rights there is a similar provision.

(b) "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." By this provision congress is prevented from enacting any law intended to interfere with the people bearing arms. This right is recognized out of consideration for the need of self defense, and abuse of this right is punishable by law. No one is permitted to control the execution of laws or to carry arms with him. Carrying arms in the execution of official duties is not the exercise of the right to bear arms. (c) "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall be issued, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This amendment corresponds to Arts. XXIII, XXV, XXVI, and XXVII of the Japanese Constitution, and confirms the old principle, preserved in the customary law, that every man's home is his castle and must not be entered without his consent. Similar protection is given to the Japanese people with regard to their persons, papers, records, letters, etc. against unlawful search. No individual is thus searched unless arrested upon probable cause or charged with a crime. Nor are his papers and

records seized unless by means of a lawful warrant.

(d) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." A capital crime, as mentioned above, is a crime that is punishable by death, and an infamous crime by death or imprisonment. In regard to this, most of the States have the same provision in their constitutions, viz. "No one shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," thus to guarantee the right of the people. By a Grand Jury is meant a body of citizens, usually twenty-three, to examine a crime, elected by the people of the locality where the crime was committed. Thus it will be seen that this provision is one that establishes both the guarantee by means of the jury system and the inviolability of property. Then, as to the right of the accused, there is the following provision: (e) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of Counsel for his defence." (f) "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (g) Then, in regard to bail, fines, and punishments, the following provision exists: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." By *bail* is meant "security money" offered to put an end to the effect of detention. Release on bail simply suspends the effect of detention, so that in case of necessity it may be cancelled. In determining the amount of bail, therefore, the judge sets his standard on such an amount as he thinks will ensure the attendance of the accused in the court when necessary. In cases involving capital punishment, the judge can refuse bail by his free judgment. Many of the State constitutions recognize the right of bail except in such cases as clearly indicate a death sentence or as are accompanied by serious inferred evidence suggestive of capital punishment. Further, it may be mentioned, there is reason to believe that this provision is the adoption of that

in the Bill of Rights mentioned before. (h) "No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor, in time of war, but in a manner to be prescribed by law." As may be supposed from the above provision, the successive kings of England had the practice of quartering soldiers in the houses of their subjects as a means of exacting money tributes from them. The kings went so far as to quarter a regiment of soldiers in the houses in a whole block in a town if that block incurred their displeasure, and this in order to infuse the spirit of obedience into the people's minds. That is one reason why the Bill of Rights has a provision similar to the above. Another reason is that in the colonies English regiments were considered as a regular menace to the liberty of the people.

As may be seen from the foregoing, the fundamental rights of the Americans, as provided for in the Federal Constitution, serve to forbid the federal government from infringing on fundamental personal rights and protect the people from tyranny. It must not be overlooked that the Americans are thus protected not only by the federal government but also by the States.

SECTION III THE RIGHT TO CLAIM TRIAL BY JUDGE

The Japanese Constitution provides in Article XXIV thus: "No Japanese subject shall be deprived of his right of being tried by the judges determined

by law." This establishes not only that no person will be tried except by judges determined by law, but also that every person has the right to claim trial and judgment by none other than judges determined by law. The Japanese Constitution further provides in Art. LVII: "The Judicature shall be exercised by the Courts of Law according to law, in the name of the Tenno. The organization of the Courts of Law shall be determined by law." Then in Art. LVIII: "The judges shall be appointed from among those, who possess proper qualifications according to law." This last provision shows that no person can be a judge without qualifications set forth in law. It also shows that every person can refuse not only trial by administrative officials but even that by a jury. By *trial* is meant "process of law," viz. both civil and criminal procedures, in which the parties concerned are each granted the right to participate in verbal pleading. In England, too, the right of the people to claim trial was recognized from early times. Particulars regarding it may be found clearly set forth in Article XXXIX of the Magna Carta before mentioned. In the United States the same right is provided for in detail in the sixth and seventh Amendments of the constitution.

SECTION IV THE RIGHT OF PETITION

One of the evils of autocratic government is the ruler's ignorance of the condition of the ruled. In constitutional government the opinions of the people are sought by means of the Ministers of State and

the Diet; besides petitions are accepted directly from the people, thus to form a sound governing spirit on the part of the ruler. The Japanese Constitution provides in Article XXX thus: "Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same." Until the 6th year of Taisho (1917), the Law of the Houses simply contained rules regarding the formalities for the presentation of petitions, but in April the same year Imperial Ordinance No. XXXVII promulgated further particulars about petitions, by which step Article XXX of the Constitution became practically applicable. According to the above Ordinance, petitions can be presented on any matters except (a) those relating to changes in the provisions of the Imperial House Law and of the Imperial Constitution and (b) those intended for interference in process of law. Petitions must be made in writing and be in such language as will not savour of insult or blame, or as will not disturb order or offend against public morals. The rules for petitions in England and the United States corresponding to the above may be found in the Bill of Rights and the latter part of the first Amendment of the constitution of America, respectively.

SECTION V SUFFRAGE

The Japanese Constitution provides in Article XIX thus: "Japanese subjects may, according to qualifications determined in laws or ordinances, be

appointed to civil or military or any other public offices equally." Thus every Japanese can assume a public office provided that he has certain fixed qualifications. From olden times the people's right to participate in politics was differentiated according to their social rank. Some, indeed, had no right of this kind at all. However, since the promulgation of constitutional government, this discrimination has been completely abolished. Still there are some doubtful points regarding this provision. According to Article XVI of the Law of Nationality, no naturalized Japanese can be Minister of State or an official of certain kinds or a member of Parliament. One wonders if this is not contradictory to Article XIX of the Constitution. It must be remembered, however, that the former article is no prohibition at all from being a government or public official of a general kind, but it simply determines a naturalized Japanese as unfit for offices of certain specified kinds. It is therefore not against the Constitution. Then the provision of Article III of the Ordinance on the House of Peers that princes and marquises, when they attain their thirtieth year, properly become members of the House of Peers seems, for the reason before mentioned, to conflict with the spirit of Article XIX of the Constitution. This is, however, not a direct infringement of the Constitution, considering that the organization of the House of Peers is commissioned to the Ordinance on the House of Peers by Art. XXXIV of the Constitution.

As to whether a foreigner can be appointed to a post in the government, there exists a question. Ariga, Shimidzu and others hold that a foreigner may as well be an official as a Japanese since the Constitution does not prohibit it in any explicit terms. Others, such as Oka, Oda, and Ichimura, insist that participation of foreigners in the exercise of the governing power of the state is prejudicial to the independence of the state. The present author is of the latter opinion. According to the Law of Nationality, a naturalized Japanese and a person of naturalized parentage who has acquired Japanese nationality cannot assume important government offices including those of a Minister of State and the President and Vice-President of the Privy Council; and according to the Election Law and the Ordinances regulating Fu and Ken, City, Town, and Village Organization, foreigners are excluded from suffrage. All this goes to show that foreigners must be excluded from officialdom, whose service is one form of suffrage.

SECTION VI THE DUTIES OF SUBJECTS

The duties of the subject as provided for in the Japanese Constitution are those pertaining to military service and taxation. They are to be borne in response to government authority, so that their volume is indeterminable, corresponding to the extent of the governing power exercised. The Constitution provides for these two duties only, simply because it aims at making them the basis of state government. They

are the most important of the various duties of the subject, and their discharge is defined by law, and not by an Ordinance, as is declared in the Constitution. This fact, however, does not suggest that any duties other than these major duties can be ruled out by an Ordinance. Far from it, anything concerning the discharge of duties that are restrictions on the exercise of rights must be determined by law as far as possible. Now (a) the duty of military service means, as the words suggest, that duty of a subject to join naval and military service as an active element of the fighting power of the state. The Constitution simply provides that any subject, in his proper capacity of a member of the organized state, must offer his life on the altar of the country so as to contribute to its fighting power and thus to shoulder its fate. Particulars are provided for in laws. As to (b) the duty to pay taxes, the Constitution provides in Art. XXI: "Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law." By a tax is meant money income collected from the subjects by compulsory means in order to defray expenses needed by the state and public bodies. The term *Japanese subjects* in the above provision must be interpreted as including not only Japanese-born but also legally Japanese persons.

SECTION VII SUSPENSION OF THE RIGHT OF LIBERTY AND AN EXCEPTION

As to (a) exercise of the sovereign power in

time of war or of national danger, the Japanese Constitution states in Art. XXXI thus: "The provisions contained in the present Chapter shall not affect the exercise of the powers appertaining to the Tenno, in times of war or in cases of national emergency." From this it follows that the rights of the subject referred to before can be violated, in times of war or of national danger, by the sovereign power of the Tenno, even without any ground in the provisions of the Constitution. By the sovereign power is meant the execution by the Tenno himself of affairs of state. This is generally called the emergency sovereign power. Foreign scholars call this power of a sovereign's the emergency power, and hold that it is not at all against any constitution. It is against these extraordinary cases that the Japanese Constitution has the above provision, and therefore the emergency sovereign power is not unconstitutional. The emergency sovereign power executes the principle that the sovereign power can do any and all things by suspending the subjects' right of liberty. This right is not one that is bestowed upon a subject by heaven, but one that exists by virtue of the sovereign power granting it. It is therefore natural that it should be suspended in a national emergency. (b) Subjects in the Army and Navy, i. e. in the naval and military service are under special obligation to obey the Tenno who is in the position of Generalissimo of the Army and Navy, and so, in principle, they are subject to the laws and discipline of the Army and

Navy in their status of servicemen, being under the guarantee of Chapter II of the Constitution only in cases not conflicting with the former. That is the reason why the provision for the right of liberty in Art. XXXII is made applicable to them additionally only in the same cases as above mentioned. The chief reason why the words *applicable additionally* are used instead of simply *applicable* is that there are many cases in which the provisions in Chapter II are hardly applicable without discrimination.

PART V
THE MACHINERIES OF GOVERNMENT

CHAPTER XIV
THE TEIKOKU GIKAI^①

SECTION I THE GIKAI^②

HE Gikai is a machinery representing the people, for the establishment of the will of the state within definite limits and defining the responsibilities of Ministers of State. Many writers have hitherto regarded this representative side of the Gikai as a legal delegation or as an agential act, but this is a mistake. The former idea is originally based on the theory of democracy, which regards the people as delegating their rights to the Gikai by means of an election, and as indirectly participating in the legislative power by its control over the Gikai. The latter regards the Gikai as a machinery legally representing the people, since the will of the Gikai can be recognized as that of the people from a legal point of view.

The first view is a very old one, but it has no legal ground whatever to justify the interpretation of

① *Teikoku* (帝國), the Japanese for "Empire." *Teikoku Gikai* is "Imperial Diet."

② *Gikai* (議會), the Japanese for "Diet." This word stands equally for "Parliament," "Reichstag," "Congress," "National Assembly," etc. *Gi* means "to deliberate"; *Kai*, "meeting or assembly."

an election as a mandate or investment of power. If there existed any relation of mandate between the two, the sphere of rights enjoyed by the mandatory ought naturally to be restricted by the will of the mandator, i. e. the people, but in practice there can be no such restriction.

The second view, first presented by Jellinek, was very influential at one time, taking the place of the former, but again this is erroneous, since originally the power of the Gikai is recognized by the Constitution, and not vested in it by any one, and so it cannot be regarded as a machinery legally representing the people. On the contrary, some jurists deny that the Gikai is a representative machinery of the people, from considerations of its legal status, but that instead it is a representative machinery only in so far as politics is concerned. The Gikai by no means represents the people in a legal sense. By this statement it is not intended to deny that the political function of the Gikai is to reflect the will of the people in general, i. e. the governed, in actual government and thus to carry on the work of government for the well-being of the people. The democratic claim that the work of government should be carried on for the people as a whole remains true only in a political sense, and it is for this reason that the principle is now recognized as a truth that the work of government should be so carried on as to represent the will of the people, if possible. It is also true that the Gikai is an indispensable instrument for the

fulfilment of the above claim, on the basis of which its rationality is recognized. When we speak of the Gikai as representing the people, we are simply giving a convenient expression to such a political idea. Therefore, the Gikai interpreted in this political sense, is a representative machinery of the people, and it is right to say that the Gikai represents the will of the people. In short, it is in a political sense, and not in a legal sense, that the Gikai is regarded as a representative machinery of the people. The Gikai ought to be regarded, legally, as one of the state machineries and, politically, as a machinery expressing the will of the people.

The Gikai being thus a representative machinery of the people only in a political sense, it is not proper to interpret an election, the major active element of Gikai government, as based on mandate or investment of power. Election may legally be interpreted as nothing but the appointment of members of the Gikai by a group of electors, and the franchise of each elector is to be interpreted, not as the right to elect members of the Gikai, but as the right recognized by the state to participate in an election performed by electors combined of a consultative body which is an important state machinery.

SECTION II THE MACHINERY OF THE GIKAI

The Gikai in a modern country consists either of one House or of two Houses. A Gikai of the unicameral system is composed of a consultative body

of members elected by popular vote, while under the bicameral system one House is composed of members elected by popular vote and the other of members elected by a special method or chosen from among the privileged classes. Only a few countries have the unicameral system today, and most countries have the Gikai on the bicameral system.

What are drawbacks of the unicameral system are merits of the bicameral system, and vice versa; consequently, it is very difficult to draw a hard and fast line between the merits and demerits of the two. If the Gikai is to be an epitome of or a mirror to society, it is advantageous to constitute it in such a manner as to reflect all the differences in the social status and abilities of individuals, not excepting the privileged classes. Here we see the ground for the bicameral system. Further, in the Gikai on the bicameral system, each House restrains the other and can prevent the arbitrariness of the other. On the contrary, in the Gikai under the unicameral system, there is a danger of the majority party becoming oppressive and over-confident because of its numerical strength. Under the bicameral system, however, such a danger is reduced considerably, the business is prudently proceeded with, and any collision between the Government and the Gikai can be better mitigated than under any other system. In modern constitutional countries, conflict between the Government and the Gikai cannot possibly be avoided unless parliamentary government is enthusiastically carried

on, because the independence of the three powers is clearly defined. Thus it often happens that the satisfactory progress of Gikai government is sadly impeded. In such a case, there is no way to relieve the situation in a country with a Gikai of the unicameral type, but under the bicameral system the House of Peers can moderate the opposition between them. Not on this account alone, however, can the unicameral system be denounced, for under that system the proceedings are usually expedited, thus facilitating the execution of the national policy. The Gikai, under whichever system, is possessed of important powers concerning law-making and finances, and its decisions have a great and lasting effect on the state, and so it is very dangerous to dispose of any matter by the decision of one House only.

Here arises the necessity for countries having the Gikai under the bicameral system to adopt these methods in order to give full scope for both Houses to exhibit their respective merits. (a) Each House holds separate sessions and each makes its own decisions. When the decisions of both Houses are in perfect accord, they are recognized as the decisions of the Gikai. (b) Both Houses are simultaneously convoked and are simultaneously opened. (c) The principle of organization differs with both Houses in that each may have its own views. If any individual becomes a member of both Houses at the same time, the object of the bicameral system will be partially defeated. It is indeed for this reason that Art. XXXVI of

the Japanese Constitution reads: "No one can at one and the same time be a Member of both Houses."

SECTION III THE MACHINERY OF THE HOUSE OF PEERS

The House of Peers is, in accordance with the Ordinance on the House of Peers, composed of the members of the Imperial Family, of the orders of nobility, and of those persons nominated there-to by the Tenno.^① (a) Members of the Imperial Family. Male members of the Imperial Family necessarily take seats in the House on reaching their majority.^② (b) Princes and marquises. Male members of the orders of princes and of marquises necessarily become Members on reaching the age of full thirty years. Members of the Imperial Family, princes, and marquises become legally Members of the House of Peers, not by Imperial Nomination or by election. Consequently there is no quorum of these members. They are called legal members.^③ (c) Counts, viscounts, and barons. Members of the orders of counts, viscounts, and barons, who after reaching the age of full thirty years, have been elected by the members of their respective orders, become Members. The number of counts is eighteen, and that of viscounts and barons is sixty-six respectively. Their term of office is seven years. As to the election of counts,

^① The Constitution, Art. XXXIV.

^② The Ordinance concerning the House of Peers, Art. II.

^③ *Ibid.*, Art. III.

viscounts, and barons, voting is by open plural ballot and the votes may be delegated. Elections are conducted by the members of their respective orders, and the detailed regulations concerning election are made with the consent of the counts, viscounts, and barons who have the right to vote. (d) Persons who have been specially nominated by the Tenno. They are life Members, who, above the age of full thirty years, have been nominated by the Tenno in recognition of their meritorious services to the State. The number of such Members cannot exceed one hundred and twenty five. (e) The members of the Imperial Academy. Four men above the age of full thirty years elected are from among the members of the Imperial Academy, and those thus elected, when nominated by the Tenno, become Members for a term of seven years. (f) Persons representing the highest tax-payers. One Member is elected in the Hokkaido, and in each Fu and Ken one Member per one hundred male inhabitants above full thirty elected by the males of that age, or two Members from among and by two hundred inhabitants, paying therein the highest amount of direct national taxes on land, industry, or trade. When a person thus elected receives his nomination from the Tenno, he becomes a Member. The number of Members cannot exceed sixty-six.

Counts, viscounts and barons are mutually elected for no other reason than that they are too numerous to take seats in the House at one time. Such mutual election neither means that Members are elected as

representatives nor does it aim at obtaining men of ability, but the principal object is to make the House of Representatives moderate its function, taking advantage of their conservative tendency which is proper to the status of a peer. Accordingly, they might equally as well be elected by lot as by voting. The reason why those nominated by the Tenno for their meritorious services to the State or for their high attainments shall not exceed one hundred and twenty-five, is to make it clear that the backbone of the House of Peers should be peers and at the same time to prevent undue pressure of the Government upon the House, as is seen in England, by making the Government submit to the Tenno's nomination of Members convenient to the Government.

Now let us observe the origin of the bicameral system in England, the cradle of Gikai government. Parliament, especially the House of Lords, is a form of assembly developed during the Norman Dynasty. The Parliament in the Norman Dynasty is said to have originated in the Parliament of the Anglo-Saxon period. As to the details of the Saxon Witan, writers differ in their opinions, but as far as we can gather, it was, an assembly of nobles, composed of the members of the Royal Family, court officials, archbishops, bishops, abbots, viceroys, and peers. The Saxon Witan, unlike the present-day Parliament, seems to have held the three powers, judicial, executive, and legislative. But in the eleventh century, the function of Parliament was definitely established and the busi-

ness of the administration and the judicature was for the most part entrusted to a committee. It was in those days that the difference between the greater barons and the lesser, the relations between the King and titled landlords, and military duties were made clear by the method of convoking Parliament. The Magna Carta, of which mention has been made elsewhere, says in Article XIV: "And for holding the general council of the kingdom concerning the assessment of aids, . . . and for the assessing of scutages, we shall cause to be summoned the archbishops, bishops, abbots, earls, and great barons of the realm, singly by our letters." In the beginning, most of the seats in the House of Lords were occupied by prelates, and in 1295 the proportion of Members of Parliament was, in a total of 138, seven viceroys, forty-one peers, twenty bishops, three chiefs of the association of monasteries, and sixty-seven abbots. Later the prelate Members gradually decreased in number until in the time of Edward II. they were seventy-six in a total of 156 Members, and at the beginning of the time of Edward III, they decreased to forty-five in a total of 131. Subsequently the number of Members often changed, and at the first session of Parliament in the time of Henry VII. the peers summoned to Parliament decreased to twenty-nine. Besides bishops, abbots and peers of all orders, judges and high judicial officers, such as the attorney-general and the King's or the Queen's attorneys-at-law were summoned to Parliament. Their

attendance, however, was not yet given recognition as their permanent right.

From 1624 to 1661 republican government was put into operation owing to the civil war, and the House of Lords was, together with the monarchical government, abolished for a time. The House of Commons, it may be added, passed on May 19th, 1649 a resolution to abolish the House of Lords on the ground that it was useless and dangerous to the English people. But the unicameral system after all ended in a failure under the republican government, and a statute called Petition and Advice was promulgated in 1657, the House of Lords coming to life again. In the eighteenth century the House of Lords always occupied a predominant position, and the principle of aristocracy prevailed both in the central part of the country and in the provinces. Among the various reasons that may be cited is the Revolution of 1688, followed by the succession to the Crown of a Hanoverian King at the hands of Parliament, especially of the House of Lords. The predominance of peers made inroads into the sovereign power until the Whigs brought the Peers Act bill before Parliament, and thus planned to deprive the King of the right to create new peers.

Sir Robert Walpole was, however, strenuously opposed to the bill for the reasons (a) that both Houses being on an equal footing in legislative power, no conflict between the two could easily be resolved, and consequently there was need of some power to

conciliate them which should be held either by the King or the people or by both, but (b) that if, in the exercise of such power, the House of Lords had to yield to the popular will of the land, it would be awkward for the former both legally and from the point of view of prestige. And here was indeed an expediency, i. e. to vest the sovereign with the power to create peers and preserve the balance and harmony of the powers of both Houses. The bill was rejected, with the consequence that the number of peers at one time reached three times that before 1719, because the House of Lords was increasingly augmented by soldiers, statesmen, artists, scientists, men of letters, jurists, and businessmen, who had led active lives in different spheres of society and performed meritorious services for the State. The right to create peers being thus in the hands of the King, the House of Lords was by degrees losing its influence. When there was a fight between the Houses on the revision of the election law from 1830 to 1832, the House of Lords was defeated and the positions of the Houses were completely reversed, the House of Commons gaining more and more in influence over the House of Lords, which at last found itself powerless to carry on its function as the second House of the legislature. Such a fate of the House of Lords can be accounted for by the fact that it was composed of a great number of Members, most of whom were hereditary.

The present House of Lords in England is composed of hereditary peers, ecclesiastical peers, and

judge peers, all comparatively conservative. To-day Hereditary peers become Members of the House of Lords on reaching the age of full twenty-one years on the death of their predecessors. These Members are: twenty-one dukes, twenty-six marquises, one hundred and twenty-one earls, forty-six viscounts, and three hundred and fifty-six barons, among whom are included twenty-eight life-members elected by and from among peers and sixteen Scotch-elected peers, the latter being Members only for the term of the sitting of Parliament and losing their membership with the close of the session. Ecclesiastical peers are not hereditary. The two archbishops and twenty-four priests of the Church of England become Members of the House of Lords during their tenure of office. As to law Lords, from four to six men are elected from among (a) those who have practised law successively for over fifteen years in England, Scotland or Ireland, and (b) those who have been high judicial officers for more than two years. Upon nomination as lords of Parliament, they are created barons, but the title is granted only for their lifetime and so cannot be succeeded to by their descendants.

The House of Lords of England is organized elaborately as above stated, but it falls far behind that of the United States of America in its political effect. For, although in England both Houses possess equal power and in the deliberation of general affairs of state the two enjoy equal rights, the House of Lords cannot pass a vote of lack of confidence in the

Government, whereas in America the Senate^① can

① In America, most of the settlements followed the example of their mother country England and had two Houses before they gained their Independence. In those days the Senate was composed of counsellors to the governors appointed by the King of England, while the Lower House was composed of those who had liberty and real estate holdings, chosen from different towns. It was for this reason that the originators of the Constitution of 1789 adopted almost instinctively the system of the Senate in the colonial days. The Convention to frame a new Constitution held in 1787 decided that the Congress of the new Government should adhere to the bicameral system, to be composed of the Lower House adopting the method of representation according to the density of population and the Senate adopting the method of allotting Members equally to each State irrespective of the density of population. In other words, the method of electing Members of Congress was based on two principles. One was for the representation of each State and the other for the representation of the inhabitants themselves of each State. Thus each State, large or small, had the equal right to send two representatives to the Senate on the one hand, while on the other it was to send to the Lower House a regular personnel differing according to the density of the population.

The first Constitution, however, adopted the method of direct election for the Lower House, and that of indirect election for the Senate. It is worth mention here that as to the election of Senators various methods were considered at first, e. g. (a) direct election by popular vote, (b) appointment by Governors, (c) election by the Lower House from among persons elected by the legislature of each State, and (d) election by electors chosen in each State. The first was rejected as savouring of too much democratism, the second as violating the administrative power, and the third and fourth were voted for only by a very few persons. After all, the method of public election by the legislature of each State was adopted on condition that in case vacancies occurred in the Senate due to resignation or some other cause during the recess of the legislature, the governor should make tentative appointments effective until the next meeting of the legislature. With the lapse of time, however, this method of election by the legislature produced ill effects rather than the good results as had first been desired. It was but natural that from 1826 onwards those who were in favour of direct popular election gradually increased until in 1893 a resolution was passed to amend the Constitution so as to realize this idea, but it was voted down by the Senate. The current of the times, however, moving along the line of popular election, a bill for the revision of the election method for the same purpose passed the Senate in 1912, and the revised bill, i. e. the present law, was put into effect in the following year. Thus for the first time was the election of Senators freed from the yoke of the legislature and fell into the hands of the people. Senators are thus elected for a term of six years. Some Senators have held

impeach the President or the Government for lack of confidence. It has been said that in England both Houses are on an equal footing in legislative power, but this is a fact only in so far as the Constitution is concerned, and as a matter of fact the House of

their office from eighteen to twenty-four years, having been elected twice or even three times. The qualifications for a Senator are (a) that he must be above the age of thirty years and have been nine years a citizen of the United States, (b) that he must be at the time of election an inhabitant of the State from which he is to be elected, and (c) that he must hold no post in the United States Government.

The number of the Senators representing each State is equal and remains constant regardless of population. This being clearly mentioned in Article III under the Legislative Power of the Constitution, it is impossible to allot to any State a number of representatives proportional to the density of population without conflicting with the provisions of the Constitution. Concerning the meaning of representation in the Senate, Orman Ray says that "a person capable of representing half a million can also represent five millions just as well as the President can represent the people of the whole of America better and more effectively than hundreds of Congressmen from the different States." Ex-President Wilson says that what gives the Senate its true characteristic and significance as an organ of the Government is the fact that it does not represent population, but various districts of the country; that therefore, Senators are not elected from densely populated districts alone, but equally from each State; that in such a country as America, where there exist many physical differences and consequently a variety of conditions—social, economic, and political—every district must be represented without regard to the number of population, that it is highly important that each State and its people should collaterally be represented; the Lower House, on account of the concentration of population in certain special districts, is gradually coming to represent particular interests and opinions and is assuming a restricted attitude toward the affairs of state in utter forgetfulness of its traditional universality of views; but that the Senate is an indispensable counterbalance." It is a political principle that in a legislature under the bicameral system both Houses should not be a mere compound, but that each should have its own background and points of view in the handling of state affairs. Especially necessary is it in America, which is vast in area and abounds in incongruities, as may be seen from the above citations.

The system of thus making one House represent population and the other the States is the best way available to maintain the balance of interests in a country under a federal system. This system has given rise to that of Germany.

Lords has never used its right of initiative for the past thirty years.

SECTION IV THE SPECIAL POWERS OF THE HOUSE OF PEERS

In principle, the functions and powers of both Houses of the Gikai are the same; so that we shall here concern ourselves first with the special powers held by the House of Peers only, leaving those of the House as an integral part of the Gikai till we come to the powers of the Gikai in general. The House of Peers has or has not the following powers vested in it, viz. (a) that alteration of the Ordinance on the House of Peers is effected only by a resolution of that House; (b) that the House of Peers has not the power to accept the resignation of a Member, or to expel him from the House, as is the case in the House of Representatives, so that the matter must be submitted to Imperial decision; (c) that the House of Peers has the right to reply to Imperial inquiries about the provisions of law concerning the privileges of peers; (d) that the House of Peers has the power to examine the qualifications of its Members and has also its own jurisdiction in law suits concerning the election of its members and the validity thereof, while the House of Representatives is empowered only to examine the qualifications of its membership; (e) that the House of Peers cannot be dissolved by order, while the House of Representatives can be so dissolved. In England, each House of Parliament has its origin

and history, and so there is a wide divergence of powers between the two Houses. One of the functions of the House of Lords, that of a supreme court of appeal, has remained unaffected by the revised election law and has always been discharged most satisfactorily. Especially the House of Lords restored, in 1876, the power to accept appeals, which had been abolished some years before by the ordinance of the Supreme Court of Judicature, and when it was registered by Parliament, permanent judges were installed in the House, to which posts were appointed specialists who were life-Lords. There were two such judges at first, but to-day there are six.

The House of Lords shares the same powers with the House of Commons within the bounds of state affairs in general, but with regard to taxation, its powers are somewhat restricted. The House of Lords also holds the same power to criticize and censure in administrative affairs as the House of Commons; but in practice it seldom passes a vote of non-confidence in the government. According to the constitution, the House of Lords indeed holds the legislative power to the same extent as the House of Commons, but the former has never used its power of initiative during the past thirty years. Consequently, it has practically passed into the hands of the executive, the legislature retaining only the power to make comments on and amend bills. As to finance bills, the House of Lords has never during the past two centuries claimed its power to amend

them, although it is a fact that, until about 1860 the House made actual use of this power, and even to-day it is said to retain it. In 1860, when the Liberal cabinet introduced a bill for the abolition of the paper duty, which had long hindered the development of the newspaper business, the House of Lords rejected it, whereupon the Prime Minister dissolved Parliament and appealed to the people. This led to the awakening of the people, who were aroused by the rejection of several other important bills and were themselves firmly resolved to do away with the House of Lords forever since it was so strongly opposed to the will of the people. Reform measures were considered, (a) whether the people should yield, or (b) whether they should appeal to force or to a peaceful revolution as occasion required, or (c) whether they should create many more peers so as to command a majority in the House, which last was, by the way, the people's desire. The first step was more than they could bear to think of; the second was considered unnecessary; and after all the third was declared the best possible step. Thereupon the cabinet announced the King's intention, if need be, to resort to some emergency measures in case he should desire any bill passed. This announcement was taken to be the King's intention to create yet more Liberal peers enough to overwhelm the Conservatives in the House, which circumstance went a long way toward suppressing opposition with the result that, in 1911, the House

passed the Parliament Act. This Act consists of the Preamble and six articles. They are in substance (a) that when a money bill submitted to the House of Lords by the House of Commons at least one month before the enforcement of the Parliament Act, is not adopted by the House of Lords, by giving no revision to it by the time of its closing, the bill shall become effective as a law subject to the King's sanction; (b) that whether a bill is a money bill or not is in the power of the speaker of the House of Commons to decide and such decision cannot be sued against; (c) that when a bill other than a money bill, rejected at two consecutive sessions of the House of Lords, has passed the House of Commons at three consecutive sessions, it shall become effective as a law by the King's sanction following a third rejection by the House of Lords, but that between the second reading of the bill given for the first time in the House of Commons and the time of its passing the third reading at a third session, there shall be the lapse of at least two years; and (d) that the duration of one session of Parliament shall be five years instead of seven, as was the previous rule.

The enactment of the Parliament Act meant a decisive victory for English democratism. By this, the House of Lords was deprived of its last resort, i. e. the right of veto which enabled it to appeal to the people in case it should be at variance with the House of Commons. Here it may be pointed out

that in English Parliament, the Lower House has practically a predominant influence and that the bicameral system has lost half the advantages originally sought for.

However, this does not necessarily mean the cessation of the authority of the House of Lords, for the above Act, though it certainly diminishes the powers of the House, still empowers it to veto a bill of whatever nature except more important party bills which the people desire to get passed. In other words, this Act makes it impossible for the House of Lords to reject bills sponsored by the cabinet, which was often the case before, but permits it to use the power to amend them or serve warnings concerning them. The House of Lords can neither support nor unseat the cabinet, but each member of the House enjoys the right to vote of his own free will, being above the wrangling of factions. This stand of the House is especially beneficial, seeing that it is thus in a position to correct any faults or omissions in legislation and advance the public interest by giving scrupulous attention even to bills of merely minor interest.

In 1917 the Lloyd George cabinet appointed a committee of members chosen from both Houses to investigate (a) the nature and extent of the legislative power to be exercised by the House of Lords after the reform, (b) the best method to alleviate any clash between the two Houses, and (c) the method for the House of Lords to exercise impartially the

powers due to it after the reform. The committee met more than fifty times during over six weeks and decided upon the following reform plans: (a) that the House of Lords shall not be empowered to amend, reject, or sponsor finance bills, but in other respects shall share the legislative power with the House of Commons; (b) that in case a clash of opinions should occur between the two Houses, it shall be submitted to a joint conference organized by 40 members evenly chosen from both Houses at that particular session of Parliament; and (c) that ten more members may be added to the above number from either House in case disputes over bills are involved.

Now for the special powers of the United States Senate. One of them is the appointing power. The Senate not only participates in legislation as an integral part of the Federal legislature, but also serves to some extent as an advisory organ to the administration. The United States constitution provides that the President shall make appointments of officials with the advice and consent of the Senate. With regard to the appointment of ambassadors, other public ministers, and consuls, judges of the Supreme Court, etc., he can only nominate them in recommendation, but must obtain the advice and consent of the Senate before making actual appointments. Whether the President's nomination will be honoured by the Senate or not depends chiefly upon his relations with the political parties. To be more pre-

cise, when the party to which he belongs is the most powerful in the Senate, his nomination is given full support; if not, not. However it must be remembered that the advice and consent of the Senate is of a passive nature and that the initiative and the consequent responsibility to be taken by the President is beyond question.

The constitution also provides that the President shall fill up all vacancies that may occur during the recess of the Senate, by granting commissions. Any official given such an appointments i. e. "recess appointment" on account of its being made during a recess, immediately occupies the post and remains in office until the Senate's next session, when on its confirmation of the appointment he becomes a regular official. In case the next session refuses confirmation, he loses the post with the adjournment of the session. The next is the power to conclude treaties, i.e. the power to decide upon the advisability of making treaties. Regarding this Munro points out that the drafters of the constitution were placed in a dilemma. According to him, they were first apprehensive that, if the power to make treaties were vested solely in the President, he himself would have full diplomatic powers, to say nothing of the important power of alliance-making. Being uncertain, however, of the attitude of the people, they thought it safe to avoid defying public opinion as best they could, while on the other hand they saw, as John Jay said, the importance of absolute secrecy and

prompt action in matters of treaty-making, which led to the expediency of vesting the power in the President subject to the advice and consent of the Senate. In Japan, treaty-making is under no such restriction, the Constitution providing that it shall be done by Imperial decision, although in case the result of a treaty necessitates payment of a sum of money agreed upon or enactment of a new national law, it requires the consent of the Gikai. The Gikai, however, is under no obligation to give its consent to it, and consequently it may sometimes happen that such consent is unobtainable. In the payment of such money, Article LXVII[®] of the Constitution may be resorted to, while in the enactment of a national law, the Gikai's consent is absolutely necessary, without which non-observance of the treaty will be the necessary result. Here it may be observed that even the Tenno's power to make treaties is under a restriction. This is a sort of contradiction, which, in America, can be avoided as the President is required to obtain the consent of Congress before making treaties. The United States Senate not only gives a decision for or against a treaty, but also has the right to amend it. The amendment necessitates the reopening of negoti-

[®] Those already fixed expenditures based by the Constitution upon the powers appertaining to the Tenno, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Teikoku Gikai without the concurrence of the Government.

ations, which, however, may sometimes be made impossible according to the nature of such amendment. To cite an instance, the arbitration treaty of 1897 was hindered by a hostile amendment made by the Senate. The third is the power of impeachment. The United States constitution provides in Article II, Section 4: "The President, Vice-President and all civil Officers of The United States shall be removed from office on Impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Further in Article I, Section 3: "The Senate shall have the sole power to try all impeachments." This rule was first introduced by the drafters of the constitution in the days when the cabinet system was not developed in the Middle Ages as a means to prevent the government from abuse of its powers. The constitution provides in Article III, under the Judicial Powers, Section 3: "Treason against the United States shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort."

Proceedings for impeachment are first instituted in the House of Representatives. When a member of the House of Representatives indicts an administrative official, a committee is instituted to consider a suitable penalty for the official in question, and upon the report of the committee being recognized as reasonable, the House of Representatives decides upon the adoption or non-adoption of that report. When it is adopted, the House submits the reason

for the impeachment to the Senate, which, assuming the duties of a court, holds a public hearing under the supervision of the speaker. In case the official to be impeached is the President of the United States, the Chief Justice shall preside. This is because, in such a case, it is considered illogical to make the speaker, who is a subordinate of the President, supervise the trial, and further, it involves the possibility of his promotion to the presidency. Impeachment differs from a civil or criminal trial, and so the penalty is simply deprivation of the qualifications for holding government posts attended by honour, credit, or other advantages within the United States. Besides the special powers above mentioned, the Senate has the power to introduce bills regarding the increase of revenue and to amend such bills adopted in the House of Representatives. As regards all other matters, both Houses have an equal legislative power according to usage as well as to the constitution. Accordingly, any and every bill must in principle be supported by the Senate's approval in order to be recognized as law.

In France, both Houses have on the whole equal powers, but all bills regarding finance must as a rule be first introduced in the Chamber of Deputies. In this respect, it may be said, there is an inequality between the two Houses, but the Senate is in no wise bound to adopt all bills passed by the Chamber of Deputies, and is therefore possessed of the power to reject them when occasion so requires. The only

question that remains is whether or not the Senate is empowered to make amendments to such bills. The French constitution has no definite ruling regarding this point, but the Senate has always been persistent in claiming such power, as, for instance, in striking out, or cutting down, or increasing, or decreasing particular taxes and expenditures as the case may be.

SECTION V THE MACHINERY OF THE HOUSE OF REPRESENTATIVES AND THE ELECTION LAW

The Japanese Constitution provides in Article XXXV: "The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election." The Election Law referred to here has been revised numbers of times since its partial revision effected by Law No. 73 in the 33rd year of Meiji, until finally the present universal manhood suffrage system was adopted in the 14th year of Taisho (1925).

(1) *Regarding the franchise Japanese law has in substance the following provisions.* (a) Universal manhood suffrage. Any Japanese subject above 25 years has a vote provided that there is no legal cause for disqualification. (b) Direct election. This mode of election has its counterpart in indirect election. The former is the electing of members directly by the people personally as electors, and the latter is the electing of members by an election

committee whose members are elected by the people, who themselves are simply electors of electors. Japan has adopted the former system from the outset.

(c) An equal franchise. By this it is meant that all electors have an equal right in contradistinction to a differentiated franchise which discriminates between electors according to their amounts of taxes, occupations, personal histories, etc. (d) Voluntary election. By this it is meant that no elector is penalized for non-use of his franchise in contradistinction to compulsory election. (e) Popular representation, sometimes called district representation. According to this system members are elected from among the entire nation in proportion to the density of population in the different electoral districts in contradistinction to interested, class, and party representations aimed at representing differently interested groups, different classes of society, and political parties respectively. (f) Secret voting. By this it is made impossible to see from the outside to whom an elector has given his vote. (g) Medium electoral district system and single voting. This combination is a system peculiar to Japan. This has in view the realization of minority representation, but of all minority representation systems it may be said to be by far the crudest one.

(2) *As regards the qualifications for eligibility for election, personal property and the place of residence have been left out of consideration from the outset, any Japanese male subject being eligible in principle. However, this*

principle is not without negative restrictions, which are, roughly, the ineligibility for election and the prohibition of holding additional posts. (a) Ineligibility for election. Two instances may be considered. (a) Absolute ineligibility for election, as in the case of one not full thirty at the time of election, or officials during their tenure of office such as those of the Imperial Household and on the judiciary, the chief and the councillors respectively of the Court of Administrative Litigation government auditors, and revenue and police officers, or naturalized and other Japanese who are not of Japanese extraction.^① (b) Reciprocal ineligibility for election, as in the case of government officials and other employees who are not eligible within the district with which they are connected in election business. (b) Prohibition of holding additional posts. By this it is meant that no person who has the qualifications for eligibility and whose election is legally valid is permitted to continue in his present official post while being a Member of the Gikai. He must either resign his post by accepting his election or keep his post by declining his election. He has the right to choose between the two. Those belonging to this category are (a) Untitled members of the House of Peers by Imperial Nomination, members of the Imperial Academy and highest tax-payer members of the House of Peers, (b) Members of the Hokkaido and other prefectoral assemblies, (c) Government

^① The Law of Nationality, Art. XVI.

officials not including Ministers of State, the Chief Secretary of the Cabinet, the Chief of the Legislation Board, Parliamentary Vice-Ministers and Councillors of the different Departments, and Private Secretaries of the Cabinet and the different Departments, who are all of them permitted to have a seat in the House.

It may be recalled that the new election law bill presented in the Chamber of Deputies by the French Government on March 10, 1927, was an attempt to replace the system of large electoral districts with the system of small electoral districts and singular voting. The main points were (a) that the singular voting be adopted; (b) that the figures of the entire population, which is the basis of the actual enumeration of the membership, shall be those of Frenchmen only, all foreigners excluded; (c) that the several departments shall each elect more than three deputies; (d) that all the districts, which are the established administrative divisions, shall each elect one deputy, irrespective of the revision of September 5, 1926; (e) that when the population of any electoral district has so grown as to exceed 100,000, one additional deputy be elected for each surplus of 100,000 or its fraction; (f) that any of the existing districts, whose population is short of 40,000, shall be merged into a district bordering on it, and that in case this merger results in an increase of Frenchmen in the said district to more than 100,000, deputies shall be ap-

portioned exactly as in the case of (e), in which case the district as merged as above shall remain undivided, forming one electoral district with adjoining districts; and (g) that the departments devastated by the War shall maintain the existing quota for the time being. It will be seen that the minimum requisite population, i. e. 40,000, is not required of these departments. Further, in these departments, deputies are apportioned to the several districts as in the other departments, and any odds are apportioned to those most populous.

The above government bill underwent some amendments at the committee meeting of the Chamber of Deputies. The main points are (a) that representation shall be, not for the French population only, as in the government bill, but for the entire population; (b) that the membership shall not be made smaller than the present; (c) that the privilege granted to the war-torn departments to maintain the pre-War quota shall be abolished; (d) that the principle that the several departments shall each elect at least three deputies, shall be abandoned; etc. In all other respects the original bill was adopted, and finally passed the Senate on July 11 without further amendments. To sum up the new election law: (a) A member of the Chamber of Deputies shall be elected by the singular ballot; (b) in the first voting those who have acquired the following number of votes shall be elected: (a) a majority of the whole number of valid votes; (b) the number of votes

corresponding to a quarter of the whole number of electors registered; (c) in the second voting comparative numerical superiority suffices, in case two candidates receive the same number of votes, the senior candidate shall be elected.

SECTION VI THE RIGHTS AND DUTIES OF GIKAI MEMBERS

ARTICLE I THE RIGHTS OF THE MEMBERS

The Members of both Houses of the Teikoku Gikai have the following rights according to their status as such. (a) Freedom of speech and decision. All Members enjoy the privilege of being irresponsible for the opinions and decisions to which they give expression within the Houses, except when they made them public in public speeches, publications, notes, and other forms, which are punishable by law. According to Article LII of the Japanese Constitution, what is called opinion comprises not only a statement of thought and of bare facts but all utterances made by a Member as an act proper to him as such. That he is not responsible outside the Houses means that he is not responsible in terms of civil and criminal laws, disciplinary punishment of officials, and other laws in general. Accordingly, the Constitution has nothing to do with his moral and political responsibilities. However, when a Member who is a government official concurrently infringes on his duties by his utterances in either of

the Houses, he is not immune from his official responsibilities.

Freedom of speech within a House is a right due to members recognized by the constitution and constitutional laws in all constitutional countries. In England, the well-known Bill of Rights (1689) says in effect that the freedom of speech, and debates and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. In the United States, the Federal constitution provides: "...and for any Speech or Debate in either House, they shall not be questioned in any other Place."^① (b) Freedom from arrest. The Japanese Constitution provides: "The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offences connected with a state of internal commotion or with a foreign trouble."^② The gist of this provision is generally known as the privilege of freedom of person. This system originated in England, where it was once the usual practice to arrest members of Parliament through undue interference in Parliament by the King or the government. According to the statute of 1770, the Commoners had the right to escape arrest during a period of forty days before and after the session, although such members as were guilty of insult to courts of

^① The Federal Constitution, Art. I, Section VI.

^② The Japanese Constitution, Art. LIII.

justice or of other offences deserving prosecution might be arrested upon report by the Speaker before the House.

The Federal Constitution also provides thus: "They (the Senators and Representatives) shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."^① Thus the freedom of person is guaranteed. In Japan, Members of both Houses who are arrested before the opening of the session can be detained in custody without the consent of the House even when the session is opened. Again, Members who are sentenced before the opening of the session and are still at large, can be arrested without the consent of the House. They cannot be set free by the demand of the House. In short, this provision is to prevent the government from illegally arresting Members under the excuse of suspected offences, by the abuse of its authority. (c) The right to claim the annual allowance. Members, except those who are such by their social positions or who are officials concurrently, are entitled to an annual allowance. Unlike a salary, such annual compensation is not intended to provide them with a livelihood, but aims to remunerate them for their services and reimburse them for expenses met by them on account of their office. Members, therefore, can decline the

^① The Federal Constitution, Art. I, Section VI.

annual allowance. In addition they enjoy the privilege of free travel. For instance, they can travel free both ways when they are called to the colours; they are given a free pass on the government-owned railways; and so on. In England, the members of both Houses of Parliament formerly received no annual allowance whether for their services or as a remuneration, but by virtue of the National Representation Law of 1911 the Commoners came to be paid £400 annually^①. In the House of Lords, the members on legal affairs only are paid £6,000 a year, and all other members are without pay. The Federal constitution provides with regard to this point thus: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

ARTICLE II THE DUTIES OF THE MEMBERS

The first duty of the Members of the Houses is to attend the sessions, engage in debate and give their decisions in a fair and impartial manner. When they wish to be absent, they must obtain leave of absence. Within the Houses, they must observe the laws and regulations relative to procedure, maintain order in the Houses, obey the decisions, and the orders of the Speakers relating to the regulation of procedure. When a Member neglects his duties, he

^① The Members of the Teikoku Gikai receive a yearly allowance of ¥3,000 each.

is referred to the disciplinary committee after deliberation by the House. Disciplinary punishment takes the form of (a) reproof before the House, (b) suitable apologies expressed by the offending Member before the House, (c) suspension of attendance and, in the case of a committeeman, the consequent loss of his office, and (d) removal from Membership. Every offence is referred to the above-mentioned committee, when committed in a plenary session or in the House, by the initiative of the Speaker or a motion with the support of more than twenty Members, and, when committed at a committee or a sectional meeting, upon report from the committee chairman or the section chief or by a motion supported by more than twenty Members.

Punishment of the Commons in England differs little from the above in its forms, there being admonition, reproof, fine (now almost abandoned), and imprisonment, for punishment determinable by trial, and in ordinary cases, prohibition from speaking, ordering out of the House, suspension of attendance, and removal from membership. The Federal Constitution has provisions establishing the duty of the Senators and Representatives to attend the respective sessions and ordering that, by means of a Law of the House and of the rules of proceedings, attendance be made compulsory. The words are: "... a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such

Penalties as each House may provide." Also: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-Thirds, expel a Member." (The Federal Constitution, Art. I, Section V.)

CHAPTER XV

THE POWERS OF THE HOUSES OF THE GIKAI

SECTION I THE POWERS OF THE GIKAI

HE Teikoku Gikai as a state machinery, participates in legislation and supervises the administration, but it has no direct administrative authority. The Japanese Constitution has no provision whatever defining the scope of the powers and functions of the Gikai, so that it can, by law, be vested with other powers and functions than those specified in the Constitution if necessity so requires. Some of our constitutional jurists hold the view that the Gikai has no powers except those clearly specified in the Constitution but that is a mistake. Does not the Ordinance on the House of Peers give the House its jurisdiction in an election suit brought by a Member of the House and also the power to answer Imperial inquiry about the provisions regarding the privileges of peers? Has not the Law of the Houses a provision granting Members of both Houses the right to interpellate the government? Can all these be against the Constitution? Certainly not; for the powers of the Gikai are not limited to those specified in the Constitution.

According to the provisions of the Constitution, the following may be cited as the powers of the

Gikai. (a) The Gikai cannot concern itself about the affairs of the Imperial Household. (b) The powers and functions of the Gikai concern in essence all state affairs belonging to the responsibility of Ministers of State. That is why the Constitution prescribes no limitations on the substance of memorials to the Throne, propositions, and petitions. (c) The Gikai has no power to exercise the sovereign authority directly over the people or to represent the State to foreign countries. (d) As to the method of participation in state affairs, the Gikai must conform solely to the provisions of the Constitution and other laws, the Ordinance on the House of Peers being included in the case of the House of Peers. (e) Each House of the Gikai has its own powers. The powers of the Gikai relative to state affairs may be divided into two thus: (a) the power to give its consent to the deeds, of the state, viewed externally and (b) the power to exert an indirect influence over state affairs without having a legal and direct influence upon the deeds of the state but by, for instance, simply giving out its opinions, negotiating with the government, the people, etc. The consent of the Gikai is of two kinds, one being consent before the fact and the latter, consent *ex post facto*. Again, the former is called approval and the latter, acceptance. The latter comes not within the power of the Gikai as a whole, but within that of each House.

(1) *Approval*. By this is meant the giving of consent to a deed of the State before its commis-

sion. All laws and budgets need the approval of the Gikai, i.e. both Houses. Approval given to a law is usually called legislative approval and that given to a budget, administrative approval. (a) Legislative approval. Legislation requires, in principle, the approval of the Teikoku Gikai. The Japanese Constitution provides in Article V, thus: "The Tenno exercises the legislative power with the consent of the Teikoku Gikai." Further in Article XXXVII: "Every law requires the consent of the Teikoku Gikai." The power of the Gikai to give approval to legislation is thus firmly established. To be more precise, the former article clarifies the principle that the legislative acts of the State invariably require the approval of the Gikai, while the latter that no laws are recognized as such unless they have had the approval of the Gikai. For the Gikai to give such approval to a law, it is necessary that a bill be introduced for deliberation. The power to introduce a bill belongs to both Houses. Approval is given, in principle, on the Gikai's own free choice. It makes no difference whether it is a government or a House bill. In the case of revision of the Constitution, the Gikai stands in a peculiar situation, having only to say Yea or Nay to the bill submitted by Imperial command. It has no power to introduce a bill of its own. (b) Administrative approval. Administration belongs, in principle, to the absolute power of the august Tenno, so that it may be carried on without the approval of the Gikai. However, budgets

and a few other matters require such approval. According to the Constitution, the following three items require the Gikai's approval. (a) The estimates of the national expenditure and revenue. (b) The raising of national loans. (c) A contract to be executed by the national treasury apart from the budget. The Gikai's approval is also required for buying a privately-owned railway in accordance with the old Railway Construction Law, for granting a private company the right to build a projected railway line, for subsidizing a steamship company in accordance with the Foreign Route Subsidizing Law, with, in this case, special reference to the amount and terms of such a subsidy.

Legislative approval, except that given volitionally, as in the case of a treaty, is an indispensable condition to the exercise of the state will, whereas administrative approval is merely a legal condition natural to the government's performance of administration, even when it is considered indispensable. Thus the government is justified from the standpoint of state administration in disbursement from the national treasury without regard to the budget, in raising national loans without the approval of the Gikai, and in concluding a contract to be fulfilled by the national treasury apart from the budget, all of which are, however, illegal. It has no initiative power concerning administration, and simply gives its consent to bills introduced by the government.

(2) *Acceptance.* This means the giving of re-

cognition *ex post facto* by the Gikai of the legality or propriety of an arbitrary state act of the government. Legislative approval, as mentioned before, is a condition prerequisite to the justification of a state act, which, reversely, cannot be justified without such approval. Acceptance, on the contrary, has nothing to do with whether a state act is valid or not, but it simply relieves the Ministers of State of their responsibility by giving consent *ex post facto*. Cases where the Gikai's acceptance is necessary may be classified as two, viz. (a) those relative to legislation and (b) those relative to administration. The former have special reference to the emergency Ordinances in Article VIII of the Constitution, while the latter refer to disbursements in excess of and extra to the budget, and an Imperial Ordinance relating to a financially indispensable measure. Acceptance relative to legislation establishes its validity for the future, and naturally, any act of legislation is invalid for the future without acceptance. On the contrary, acceptance relative to an act of administration in no wise affects its validity: it simply gives recognition *ex post facto*.

The powers possessed by the English Parliament, briefly, refer to its decision concerning bills, which are, more exactly, those for laws, budgets, and settlement of accounts. Exercise of the legislative power with particular reference to bills for laws constitutes the major part of the powers of Parliament. Bills to be decided by Parliament are of the follow-

ing three kinds. (a) Public bills, which are those for laws drafted with public interest in view. (b) Money Bills, which are those concerning the expenditures and revenues of the state, such as taxation bills, estimated expenditure bills, finance bills, etc. More minutely, they concern (a) the imposition, abolition, reduction, and alteration of taxes, exemption from taxes, etc., (b) aid and alteration or abolition of aid to a fixed fund for the redemption of debts or other financial purposes, (c) annual expenditure, (d) appropriation, collection, custody, and payment of public money, and auditing, (e) floating, guaranteeing, and refunding of loans, and (f) matters relative to the above items or matters incidental to any one of them. With regard to these bills the House of Commons has the initiative and the priority. The House of Lords has no power to amend or reject these bills; it simply has the right to give its consent. (c) Private bills. These are bills for laws affecting specified individuals, business concerns, and localities. The first of these three refers to matters of an altogether individual nature, such as those relative to naturalization, death, exemption from taxes, etc.; the second refers to the granting of monopoly or self-government to railway, electric, gas and other companies or other legal persons; the third refers to specified localities, trades, fisheries, sea-routes, harbours and ports, floods, preventive measures, and other matters purely local.

The powers possessed by the United States Con-

gress, i. e. Congressional powers may be classified into three groups. One of them comprises the mandatory power and implied power; another, voluntary power and accepting power according to the extent of the responsibility involved; and the remaining one group comprises many kinds according to the extent, the nature, and the importance of the matters involved.

(a) It does credit to Marshall, who was Chief Justice of the Supreme Court about a century ago, that full recognition and right interpretation was for the first time given to the powers of Congress which legislates, as clearly mentioned in the constitution, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Concerning the divergence of opinions between Federalists and anti-Federalists, he said that a sound interpretation of the constitution should be such as would not interfere with leaving to the legislature a free choice of steps in order to exercise its powers over the people most advantageously to them. He also emphasized the necessity for all ends and aims to be legal and lie within the bounds of the provisions of the constitution so that all steps to be taken might be constitutional by being in line with those ends and aims. It will be seen that he thus pointed out the fact that the appendant powers were important powers to Congress and the government. The Federal police

power, which controls the liberty of the people and their right of property with a view to promoting public health, morality, and welfare generally, is not provided for in the constitution, and consequently its exercise is in the hands of state legislatures and city councils. This means that the police power, generally believed to be vested in Congress, is only one of the appendant powers of Congress. (b) Both the mandatory and implied powers are for the most part voluntary powers, according to the second classification mentioned above. It is all because Congress is free to use some of those powers to the full and some in part, while it can leave some entirely unused. For instance, the power of Congress to raise national loans on the credit of the United States must on no account be interpreted as the power to do so irrespective of the financial conditions of the United States government. (c) Besides the above, the various powers specified in the constitution may be classified as four: (a) the powers delegated to Congress alone, (b) the powers possessed in common by both Congress and the authorities of the several states, (c) the power whose exercise is prohibited by Congress and the authorities of the several states, and (d) all other powers originally due to the several states. The powers delegated to Congress are, as mentioned in the constitution, the financial power relating to taxation and national loans, the power to control commerce relating to inter-state and overseas trade, the special

power relating to the coinage of money, regulation of the value thereof at home and abroad, and punishment for the forgery of securities and currency, the power to control the post-office service, the judiciary power, the power to control national defense, relating to the declaration of war maintenance of the army and navy, and the making of rules for the government and regulation of the land and naval forces, the powers concerning such matters as naturalization, bankruptcy, patent rights, copyrights, government of districts under direct control of the United States government, etc., and the implied powers. All these enumerations cover the eighteen items in Section VIII of Article I.

It must not be considered that the powers delegated to Congress are all to be exercised by Congress. Such powers as cannot be interpreted as delegated to Congress alone, there being no prohibitive rules neither for the states nor for the Union, are known as common powers, which can be exercised both by Congress and the authorities of the several states. This means that two different laws may be made by the Union and one of the states for one and the same purpose. For instance, the first clause of Section IV of Article I. of the constitution stipulates thus: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by The Legislature thereof; but The Congress may at any time make or alter such regulations, except as to the Places of

Choosing Senators," which clearly shows that both a state and a Federal law may be made regarding the same matter. It is at the same time clear that the power of final decision is in Congress with regard to the election of Senators. It may sometimes happen that a power delegated to Congress is not used, there being little or no necessity for using it. In this case it is possible for the state concerned to make a special law regarding it.

SECTION II THE POWERS OF THE TWO HOUSES

Each House of the Gikai can exercise the following powers without agreement between them. (a) Presentation of addresses to the Tenno. The Japanese Constitution has in Article XLIX the following : "Both Houses of the Teikoku Gikai may respectively present addresses to the Tenno." When either House finds it necessary to present an address to the Tenno, more than thirty Members of the House must give their consent to it and first deliberate on the matter. When it is decided upon, the matter in hand should be addressed to the Tenno in writing. There are no legal restrictions as to the kinds of matters to be thus addressed to the Tenno. A writing for presentation may concern congratulation, condolence, and other matters of courtesy relating to the Imperial Household, and even political matters. One of the most important of such addresses relative to politics is one for the impeachment of Ministers of State. The Tenno is under obligation to receive all addresses presented,

but it rests with his free will and choice whether or not to adopt them. (b) Request for reports and correspondence. Both Houses have the right to ask for and receive various reports from the government. The government is bound to communicate with and send reports to the Houses, but in special cases it can refuse to do so. Reports on the settlement of annual revenues and expenditures and on auditing are requirements according to the Constitution. Both Houses can also ask for reports of the government regarding petitions forwarded to the latter. (c) Representations to the government. According to the Constitution, "Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session."^① By a *representation* is meant an "act of setting forth to the government the desires of the Houses." It differs from an address to the Throne in that it is submitted to the Ministers of State. Whereas no restrictions are set on the nature of an address to the Tenno, a representation must be limited to matters concerning the duties of the Ministers of State, simply stating desires relative to future administration, and cannot be used for impeachment of past maladministration by the government. The government is under obligation to receive all representations, but is in no wise bound to make replies to them or to take any

^① The Constitution, Art. XL.

definite steps on their account. A representation, when not accepted, cannot be made a second time, but a representation may quite validly be made by one House after the other has already made a similar one on the same matter. (d) Resolution. By this is meant an act of each House to decide its opinion on affairs of state. Neither the Constitution nor the Law of the Houses provides for it, so that it does not become legally effective outside the Gikai, but it does become effective politically. A resolution of non-confidence in the cabinet or in any particular Minister of State, or one giving expression to the opinion of each House regarding the interpretation of the Constitution, or one declaring an act of the government illegal may be cited as an instance. (e) Reception and transmission of petitions. According to the Japanese Constitution, "Both Houses may receive petitions presented by subjects."^① A petition is received at either House through the introduction of Members of the House and is examined by a petitions committee. It is then submitted for deliberation in the plenary session of the House, provided the said committee has so decided or more than thirty members have requested it. When either House has decided that a petition presented should be accepted, it can transmit it to the government with a statement of its opinion attached to it. Transmission of a petition has the same effect as a representation. (f) Investigation. Both Houses have the

^① The Constitution, Art. L.

right to set up a committee for the investigation of state affairs, although this is not expressly mentioned in the Constitution and the Law of the Houses. Such investigation is limited to a very narrow scope, it being usually carried on exclusively with respect to the settlement of annual revenues and expenditures; and that because neither of the Houses, with the exception of Ministers of State and members of the government committee, has the right to exchange correspondence with the different departments of the government and with prefectoral assemblies. (g) Interrogation and interpellation. Members of both Houses can interrogate the government provided they are supported by more than thirty Members. Interrogation is an act of requesting a reply from a Minister of State; and any Member, in order to make an interrogation, must first present to the government through the Speaker of the House a written application for interrogation. The government is under obligation to reply to this interrogation unless it concerns matters requiring secrecy, in which case it can refuse to reply by stating the reason.

Members of both Houses can also interpellate orally concerning any doubt he may have about the subject under discussion. This may be called informal questioning as against formal questioning through formalities. An informal question may be asked singly by individual Members, no support being required from other Members. A formal question

is always asked of a Minister of State, while an informal one may be put to a Minister of State, a member of the government committee, the Speaker or the sponsor, as the case may require. (h) Permission to arrest Members. In order to arrest a member, permission must be obtained from the House to which the offending Member belongs.^① (i) The privileges of the House of Peers. All that has been said thus far covers what may be considered the special rights of the House. (j) The priority of the House of Commons with regard to the budget. As to the giving of their consent to bills and to legislations, both Houses have an equal right, but as to the budget, the House of Representatives has the priority.^② It is because the budget has an important bearing upon the people's duty to pay taxes, and much is made of the opinions of Representatives elected by the people. With a few exceptions, this is the rule in most constitutional countries. As to whether the Upper House has the right to amend a decision of the Lower House, the systems differ in different countries. Some countries do not recognize such a right, while others simply grant the right of priority, the Japanese Constitution being an instance among many. Thus the House of Peers is at liberty

^① The Constitution, Art. LIII.—The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offences connected with a state of internal commotion or with a foreign trouble.

^② The Constitution, Art. LXV.

to make whatever alterations it pleases in a budget once decided upon in the House of Representatives. It can even restore intact a government budget which has been minced and chopped at the hands of the House of Representatives with abolitions, exclusions, and curtailments; and all this because it has the right of amendment. In this connection, it may be recalled with interest that during the third session of the Gikai an Imperial message was received saying, in effect, that the right of amendment of the House of Peers was susceptible to no control by any decision of the House of Representatives and that it was also within the right of the former to restore any item in the Budget which had been abolished or cut by the latter. In deliberating on the budget, the House of Peers acts on the basis of the original government draft, and not on that which has undergone alterations in the House of Representatives. This fact implies that the House of Peers can restore all abolitions, exclusions, and curtailments to the extent outlined in the draft budget.

The powers possessed by the English Parliament may be cited. (a) The power to publish proceedings. This means that each House has an exclusive right to make public all proceedings conducted within the House. (b) The power of House Organization. By this is meant the power of each House to determine its own organization. Accordingly, the House of Commons can issue an order for a by-election in case there is a vacancy in the Membership. It also

can go to law over matters relative to elections. The House of Peers has the power to pass judgment on any dispute relating to the status of peers. Further, the two Houses equally can reject such Members as are found deficient in their qualifications or have disgraced the honour of the Houses. (c) The power to summon witnesses. Each House can call witnesses and examine them. (d) The power to request official correspondence. Each House can request the different departments of the government to communicate with it when occasion so requires. (e) The judicial power. There is a wide difference between the judicial powers of the two Houses. Whereas the House of Commons has power only regarding trespassers upon the privileges of its Members, the House of Lords has, in addition to this same power, power regarding a lawsuit for impeachment in the House of Commons, being itself the highest court of justice in the United Kingdom, and also a special court of justice for peers only. The House of Lords has also the judicial power regarding law-suits relative to the status of peers. (f) The power of disciplinary action. By this is meant the power of both Houses to take disciplinary action against Members. Such disciplinary action resolves itself into four categories, viz. (a) prohibition from speaking, (b) ordering out of the House, (c) prohibition from attendance, and (d) removal from membership. (g) Acceptance of petitions of a public nature. Both Houses can accept petitions for enact-

ment or revision of laws presented with the view of relieving public inconveniences or distresses. (h) The Power of addressing messages to the King. This is the power to lay before the King the opinions and desires of the Houses. (i) The power to settle accounts. It is of two kinds, viz. (a) that conducted by the executive and (b) that by the House of Commons. The former is in the hands of the Chancellor of the Exchequer and the Chief of the Board of Audit, while the latter is in the hands of the Settlement Committee of the House of Commons. The members of this committee are chosen in the House at the beginning of each session. They must include the Chancellor of the Exchequer, the opposition member who is ex-Chancellor of the Exchequer, and twelve other Members well versed in financial matters. This committee examines the statement of accounts submitted by the Chancellor of the Exchequer and the Chief of the Board of Audit.

In the United States both the House of Representatives and the Senate have the same amount of legislative power by usage as well as by the constitution, except that the Senate has the right to propose and revise bills regarding revenue increase; consequently all that has been said already elsewhere about the powers of the Senate may be taken to apply to Congress generally.

CHAPTER XVI

THE MACHINERY OF THE HOUSES AND THEIR PROCEEDINGS

SECTION I OPENING, PROROGATION, CLOSING AND DISSOLUTION OF THE GIKAI



CORDING to the Japanese Constitution, "The Tenno convokes the Teikoku Gikai, opens, closes, and prorogues it and dissolves the House of Representatives."^①

(1) *Convocation and opening.* Members of the two Houses cannot meet of their own will and perform functions effective in the light of national law. Only when they meet in response to the summons of the Tenno can they function legally and effectively. A meeting held without a command from the Tenno is merely private and should be subject to the application of Police Regulations for the Maintenance of Public Peace. An Imperial Edict for the convocation of the Gikai must be issued at least forty days before the opening. It is an Imperial command addressed to each individual Member, a command to assemble at a fixed place on a fixed date. Convocation of the Gikai is promulgated publicly and is intended as a notice to each individual Member.

The Gikai is convoked once every year. This rule, combined with the rule to fix the duration of

^① The Constitution, Art. VII.

each session for three months, well serves to make the Gikai a component element of the machinery of constitutional government notwithstanding the fact that it is not a government establishment of a permanent nature. It is by virtue of these rules, indeed, that the Gikai has its existence and the safe performance of its functions is guaranteed. "When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one." By the words *urgent necessity* is not meant a time when there is a special bill or budget calling for immediate decision, but simply a temporarily urgent matter necessitating the convocation of the Gikai. In other words, it may mean the necessity for convoking an extraordinary session in addition to the ordinary one. Even when an extraordinary session is convoked, there is no need of announcing beforehand the matter to be discussed, nor are all matters for deliberation of an urgent nature. When it is opened, there is nothing extraordinary about it which distinguishes it from an ordinary session.

When the House of Representatives is dissolved, a new House must be convoked within five months of the dissolution. However, the general election after the dissolution must be held within thirty days from the dissolution.^① When the new House happens to be convoked in November or December, it is practically an ordinary session, but not at other

^① The Law for Election of the Members of the House of Representatives, Art. XVIII, Cl. 3.

times. An ordinary session is fixed for three months, but in case of necessity, the duration of a session may be prolonged by Imperial order. The duration of an extraordinary session is determined by Imperial order. It is fixed by Imperial order in the Imperial Edict convoking the extraordinary session. It can also be prolonged by Imperial order. The opening of the Gikai at once places both Houses, already organized, in a position to perform their functions. The Imperial command for the opening is meant for the Gikai as a whole, and not for individual Members. In the House of Representatives when neither president nor vice-president is yet chosen, as in the case of the first session after a general election, three candidates for each are first elected. Of these one candidate is appointed president and one vice-president by Imperial order, and then in each House the whole Membership is divided into several groups, with a head over each. These heads are elected by and from among the Members of each group. What is generally known as the inauguration of the House of Representatives is tantamount to the appointment of the president and the vice-president and the apportionment of Members to each group; for it is only by such means that the House is placed in a position to open the rostrum.

In England, too, the King has power to convoke, dissolve, and close the House of Commons. The duration of an ordinary session is six months, from the beginning of February to the end of

August, which is much longer than the practice in Japan. An extraordinary session is convoked by the King's command. The formalities needed for the closing of the House are much the same as in Japan. In the United States, Congress is convoked at least once in every year, and opens at noon on the 3rd day of January, unless otherwise ordered by law. The Senate may sit in an extraordinary session even during the prorogation of the House of Representatives, provided the President so desires, as in the case of examination of members relative to impeachment, appointment of administrative officials, sanction of a treaty, etc. The term of office of a member of the Lower House is two years, beginning at noon on the 3rd day of January of the year following the election and ending at noon on the 3rd day of January two years after.

(2) *Prorogation, adjournment, and closing.* Prorogation is the suspension, during the period of a session of the Gikai, of the condition in which both Houses are enabled to open the rostrum and perform their functions. This does not at once mean the dissolution of the organization of the Houses, so that matters under discussion simply remain pending. Prorogation is proclaimed by an Imperial Edict for a period not exceeding fifteen days. The days so set for prorogation are reckoned in the total period of the session. Prorogation may be made twice during the same session, but the total number of days prorogued cannot exceed fifteen. Prorogation may be pro-

claimed sometimes for the convenience of the government or for the adjustment of proposed bills, but the most important cases are (a) when the Gikai or either of the Houses has become high-handed and immoderate under the influence of an overwhelming majority, necessitating reflection on its part, (b) when the government has clashed with the Gikai or either of the Houses, and (c) when a clash between the two Houses permits of no alleviation, calling for efforts to harmonize them and to control their agitations. A singular kind of prorogation may be cited, which is proclaimed to the House of Peers when the House of Representatives is dissolved. It goes by the same term, but in essence it is the closing of the House. Prorogation may be distinguished from adjournment. The latter takes place when there is no bill proposed or when an investigation is necessary. It is a voluntary suspension of the proceedings of the House. During a prorogation, neither of the Houses can meet in a legal sense, but during an adjournment it simply does not meet of its own free will. In the case of a prorogation, it is necessary that the two Houses should simultaneously suspend sitting, whether in plenary session or in sectional committee meetings, while in the case of an adjournment, which is made by each House independently of the other, each House suspends its plenary session only, although it can hold committee meetings.

The closing of the Gikai means putting an end

to the existence of the Gikai. The Gikai, closed, puts an end to all proceedings of the Houses and nothing can be carried forward to the next session. This is called the principle of non-continuation of a session period. This principle is universally observed, but it is simply a practical usage, with no provision for it in any constitution. Some hold that it is based on the legal ideas and usage pervading all Europe, while others base it on the spirit of established constitutional usage. The Japanese Constitution, also, has no provisions relating to this principle, but the Law of the Houses says in effect that when the Gikai is closed, no bills, no representations, no petitions can be carried over to the next session even if they remain undecided. By virtue of the Law of the Houses (Art. XXXV) the above principle may be considered as an essential element of the Constitution, but even if it were not for such a provision, it would be self-evident that the closing of the Gikai at once puts an end to the existence of the Houses, that the Teikoku Gikai no longer exists, and that all proceedings have naturally been finished, never to be carried forward to the next session.

In the English Parliament, no distinction is made between prorogation and adjournment, there being only adjournment. In Japan, a simultaneous suspension of sitting by both Houses by Imperial order is called *teikai* (prorogation), and a spontaneous suspension of sitting by each House quite independently of the other is called *kyukai* (adjournment). In En-

gland, a sitting is suspended by the decision of each House made quite independently of the other and no suspension by Royal order is known nowadays. However, only when a suspension i. e. adjournment extends over a period of 14 days has the King the power to issue an edict ordering resession by a fixed date. The closing of Parliament, as in Japan, results in effect in the non-continuation of the session.

In the United States, the Federal constitution provides thus: "Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting."^① This is intended to prevent either of the Houses from adjourning for a considerable length of time and interfering with legislation by moving to any place outside of the capital.

(3) *Dissolution.* By dissolution is meant an act by which the Members of the House of Representatives are deprived of their positions as such before the expiration of their legally established term of office. This act is directed to all Members simultaneously; hence the term. Thus the dissolution of a session of the House at once means the deprivation of the positions of all the Members who shall have been sitting prior to the proclamation to that effect, and so it follows that with it the House itself ceases to exist. Dissolution results in all the effects of the closing of the Gikai so that all proceedings

^① The Federal Constitution, Art. I, Sec. V.

under way before the dissolution will not be carried over to the next session, the House of Peers being at the same time prorogued. The political object of dissolution is to appeal to the public judgment when there is doubt as to whether the intentions of the House are really representative of public opinion. A dissolution of the House of Representatives has its counterpart in the House's resolution of non-confidence in the Cabinet and is important from the viewpoint of the Constitution. In England and other democratic countries, dissolution is considered the last possible step to ascertain the will of the people, who possess the sovereign power, and to secure their judgment. In England, therefore, when the government and the Lower House are at variance with each other, the ministers of state must resign en bloc, or else the House must be dissolved. If the new House following the dissolution should still persist in opposing the government, the ministers must resign. In recent years it has been the rule that the cabinet resign long before the introduction of a vote of non-confidence, when the opposition leads the House. It may be added that the executive in England, even when it is convinced of the support of a large majority on any policy or legislative measure, is willing to see the House dissolved, thus to appeal to public opinion and secure stronger support. It sometimes happens that when the executive fails to win the confidence of the House or to push through any finance bill, it will either resign or seek a dissolu-

tion. As will be seen from the foregoing, the dissolution of the Lower House in any country is of great significance. That is why in England, when a new cabinet is organized, Parliament is sure to be dissolved and a general election is held immediately, to ascertain what party it is that most attracts the people. Consequently it often happens that the very party, which went out of power a short time before, gains new strength and comes into power again.

There is another thing that cannot be overlooked with regard to the dissolution of the Gikai. It is a voluntary dissolution by the government. It is proclaimed when the government has brought a war to a successful close, or when it has pushed through a most popular bill, or when it has shown itself competent in carrying out its policy; and all this because the government naturally chooses to order an election just when its own party is in popular favour. An election at any other time would involve the government in anti-government propaganda conducted by opposition parties prior to the election. It must not be supposed that the system of dissolution in our national law means the same thing and works in the same way as that in England. In order, however, to smooth and harmonize the relations between the government and Gikai which are too often strained due to the adoption of the principle of the independence of the three powers, the government may restrain the Gikai by means of dissolution on the one hand, while on the other it may restrain the

government by such means as a vote of non-confidence, rejection of government bills and budgets, and their amendment.

When a clash between the government and the Gikai hinders the smooth progress of state affairs, the Tenno will either cause the cabinet to be reorganized or dissolve the Gikai, thus determining whether it really represents the will of the people. A dissolution is therefore usually proclaimed when there is a divergence of opinions between the government and the House of Representatives, but it is also possible even when there is a clash between the government and the House of Peers, thus to ascertain the trend of public opinion and to call for reconsideration by the House of Peers, which is legally above dissolution. Dissolution is also possible when there is a clash between the two Houses, or when the government is in collusion with either one of the Houses; and that chiefly in order to bring about a change in the situation.

Dissolution does not mean in the least the punishment of the House of Representatives, as is erroneously held by some: far from it, it is because the House occupies a predominant position that such a step is taken against it. The existence of such a system does not in the least impair the essential nature of the House as an assembly of the people's representatives.

Dissolution is proclaimed by an Imperial edict. If it happens to take place during the sitting of the

Gikai the government at once makes a declaration to that effect in both Houses, causes all proceedings to be discontinued, thus putting an end to the existence of the House of Representatives, and declares the House of Peers prorogued.

SECTION II THE REGULATIONS FOR GIKAI PROCEEDINGS

The Japanese Constitution provides thus: "Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs."^① The word *rules* mentioned above means such provisions in the Law of the Houses as relate to the management of all affairs inside the two Houses. These rules exist within the limits allowed by the Constitution and other laws, and cannot go beyond those limits. However, it may be noted that there are not a few countries where such rules are against the provisions of their constitutions and laws. It is all because, if such rules are recognized by both Houses, there are no machineries who would declare them invalid, nor does any ruler ever object to them. It follows therefore that, in any case, such rules are practically part of the constitution. Even if they are against the constitution and other laws, they are simply invalid in theory, but in fact they hold perfectly well.

The regulations for the management of affairs

^① The Constitution, Art. LI.

in the Teikoku Gikai are made by the decision of the Gikai only, without Imperial sanction or any need of enactment. Accordingly they are effective within the Houses only, with no validity outside. These rules must not conflict with the Law of the Houses, but their validity extends not only over Gikai Members, but over all persons coming inside of the Houses, whether they may be visitors or ministers of state or persons on government committees. These rules are not subject to the application of the principle of non-continuation of a session, and in consequence hold permanently unless abolished or altered. The details underlying the method of procedure prescribed in the Constitution, the Law of the Houses, and the regulations above referred to are as follows.

(1) *The quorum.* In order to open debate and take a vote, it is necessary that not less than one third of the whole number of the Members should be present.^① In order to amend the provisions of the present Constitution, the quorum is specially fixed at not less than two-thirds of the whole number of Members present.^②

(2) *The method of voting.* Decision must be made in the two Houses by absolute majority of votes. In the case of a tie the matter should be decided by the voice of the Speaker.^③ There are a few exceptions to this rule of voting by absolute

① The Constitution, Art. XLVI.

② Ibid. LXXIII.

③ Ibid. XLVII.

majority, viz. (a) when the provisions of the Constitution require amendment, (b) when a reading is to be omitted^①, and (c) when a Member is to be removed from the House of Representatives, etc. In these cases a majority of more than two-thirds of the whole number of Members present must be obtained.

(3) *Open procedure.* In every country Parliamentary proceedings are open to the people in order to keep the Houses and public opinion in close touch with each other. The Constitution provides that all deliberations must be held in public. However, a session may be held with closed doors, either upon the demand of the government or by the resolution of the House.

(4) *Attendance and voice of ministers of state and of government delegates.* Ministers of state and government delegates may at any time take seats and speak in either House. This is because the government introduces laws and other bills in the Houses and the ministers of state are responsible to the Houses for these bills. By a *government delegate* is meant one who by order of a minister of state undertakes the task of explaining the opinions of the government to the Houses. No minister of state or government delegate can join in a decision except when he himself is a Member. Ministers of state and government delegates are required to use their right of speech with the permission of the Speaker

^① The Law of the Houses, Art. XXVII.

as in the case of Members, but they need not give previous notice of their intention to speak, nor are they subject to the restriction requiring them not to speak on the same subject more than twice.

(5) *Debate as prescribed in the rules for proceedings and the regulations for the management of internal affairs.* According to the above law and rules (a) A bill may be introduced or amendment may be moved only when the prescribed number of supporters is obtainable. To be exact, the proposal of an address to the Tenno or of a representation to the government and a motion for amendment of a budget must be supported by more than thirty Members present, and all other proposals and motions by more than twenty. (b) A legal bill is voted on after its third reading, although this can be dispensed with by the decision of the House. (a) The first reading. At the first reading discussion is carried on on general matters pertaining to the bill and a decision is made as to whether a second reading should be held. If decided in the negative, the bill is considered abandoned. (b) The second reading. At the second reading the bill is examined article by article, leaving thereby chances for motions for amendments. (c) The third reading. Here a decision is made as to the bill as a whole, pro or con. No motions for amendment are permitted except for changes in wording or for amendment of conflicting matters in the bill or with provisions in the existing laws. The third reading may be dispensed

with upon the demand of the government or of more than ten Members present only when it has been passed by a majority of two-thirds of the whole number of Members present. (c) Debates. Those who want to speak or otherwise express their opinions about the subjects for discussion on the order of the day must give previous notice to the Speaker through the secretary. Members cannot speak on the same subject more than twice, special instances being excepted. Any Member can move the conclusion of a debate with the support of more than twenty members even when there is another Member still speaking.

(6) *Amendment or withdrawal of a bill.* The government can at any time amend or withdraw a bill which it has already introduced.

(7) *A conference of the two houses.* When it is necessary that a bill adopted in one House should be amended in the other House, the latter must obtain the consent of the former, but in case it should fail to get such consent, the two Houses must hold a joint conference. This conference is organized by two committees of an equal number not exceeding ten each, elected from the two Houses. When the two committees come to terms, the matter in question must be first discussed in the former House and then passed on to the latter. In this case the third reading is dispensed with.

In England, each House has its own House law, for the enactment of which the consent of the House

concerned and of the King is required, but not the consent of the other House. Besides the written law of each House, England has customary laws of 600 years' standing, which have grown out of the usages in Parliament and having the same validity as statutes. Bills introduced in the English Parliament are of two kinds, those sponsored by the government and those by ordinary members. The former attract the attention of the whole of the Lower House, and the most important bills are discussed by the entire House or sometimes carefully studied by specially appointed committees. To be more exact, every law bill must pass its first and second readings, the committee meeting, the report meeting, i. e. the plenary session, where the report of the committee meeting is carefully studied, and last of all its third reading. Then the bill is forwarded to the other House, where through the same formalities, it is promulgated as a law after obtaining the signature of the King. At the first reading of every bill, it is usual that the minister of state who first introduced it or any other minister most closely connected with it, explains it and answers all questions,

All bills must obtain the approval of both Houses in England as everywhere else, but what is peculiar to that country is that the House of Commons has the right to keep in custody any bill that concerns finances, and that even as regards other kinds of bills, it can keep them for two years after their rejection

in the other House and, by itself passing them twice during that time, can make them valid laws. The House of Commons thus occupies an important position in English legislation and has the sole right to introduce bills, the House of Lords merely amending bills forwarded by the former or deciding on them, pro or con.

The United States constitution also provides that the rules for procedure in both Houses be determined by each House independently of the other. It also fixes the quorum for carrying on Congressional proceedings at more than half the whole membership of each House. It must be noted, however, that, as has been said before, amendments to any provision of the constitution require complicated and strict formalities. As to opening the proceedings of the Houses to the public, the constitution also provides thus: "Each House shall keep a Journal of its Proceedings, and from time to time publish The Same, excepting Such Parts as may in their Judgment Require Secrecy."^② Deliberations on bills also require three readings. Debates are held before their third reading, but they may be continued during the last reading. Bills which pass their third reading are passed on to the Senate, where they receive amendments and are then sent back to the House of Representatives. When the latter reject these amendments, a conference of the two Houses is called, as is the case in Japan. A bill which has

^② The Federal Constitution, Art. I, Section V.

passed both Houses is signed by the Speakers of both Houses and presented to the President of the United States. When the latter approves and signs it or when he does not take any step against it, it becomes law, and is kept in custody as an official document in the State Department to be inserted later in the printed Code of Laws.

The President's veto, unlike the sovereign's sanction in a monarchical country, does not constitute an essential factor in legislation, but it is the power to prevent Congress from passing an undesirable law in an arbitrary or ill-advised way. A bill may become law even when the President does not sign it within ten days (Sundays excepted) of its presentation, provided it happens to be during the session of Congress. In case the President considers the bill as infringing on the constitution or a treaty, he sends it back within ten days, stating his objections, to that branch of Congress in which it originated, where it is re-discussed. This power of the President, to use the common expression, is the veto power.

SECTION III THE INTERNAL MACHINERY OF THE TWO HOUSES

Each House has a president and a vice-president and is divided into several sections, each with a committee to prepare proceedings.

(1) *The president and the vice-President.* The President and the vice-President of the House of

Peers are appointed by Imperial order from among its Members, their term of office being seven years respectively. The President and the vice-President of the House of Representatives are also appointed by Imperial order from among three candidates for each elected from its Members. Their term of office is the same as that of the Members. They are under obligation to continue in office even at the expiration of their term of office when their successors are not yet appointed. It sometimes happens that the Chief Secretary of the House temporarily assumes their duties when they cannot perform their functions due to their failure in a general election, it being required that they should be Members concurrently. The duties of the President are (a) adjustment of proceedings, (b) exercise of the police power within each House, (c) exercise of the domiciliary right of the House, by which he may permit or refuse entry into the premises of the House of police and other officers and visitors, and may order visitors out, and (d) representation of the House. The President supervises the business of the House when it is not sitting. The vice-President acts for the President when the latter is prevented from attending to his duties.

(2) *The several sections and committees.* With the exception the President and the vice-President, the membership of each House is divided into nine sections at the beginning of the session and these then elect committees. Each committee examines

the bills introduced prior to debate on them and investigates certain other matters. These committees are as follows : (a) The House committee, composed of all the Members of the House. Practically, its meetings differ little from plenary sessions, except that the former have their own President and their own rules for proceedings. At a House Committee meeting, Members can speak as often as they choose. Such a meeting may be held on the motion of more than ten Members of the House or of the President or by the resolution of the House. (b) Standing committees. These are elected at the beginning of the session, remaining in office during that session only. In the House of Peers these committees are of five kinds, viz. (a) the qualifications investigation committee of nine, (b) the budget committee of forty-five, (c) the disciplinary committee of nine, (d) the petitions committee of thirty-six, and (e) the settlement committee of thirty-six. The House of Representatives has (a) the budget committee of sixty-three, (b) the settlement committee of forty-five, (c) the disciplinary committee of twenty-seven, and (d) the petitions committee of forty-five. (c) A special committee, appointed for the investigation of any particular bill. The membership is nine, subject to increase by the decision of each House. (d) The continuation committee, sometimes appointed by the demand or consent of the government for continuation of investigation of a particular bill during the recess of the Gikai. In principle, no bill

can be brought over from one session to the next, but any bill that is submitted to continued investigation by this committee is accepted in the next session. The quorum for a House committee meeting is one-third of the whole membership and that for other committee meetings is one-half of the membership of the respective committees. A House committee meeting is open to the public like a plenary session, but all other meetings are held in camera, although, in practice, all committee meetings are open to pressmen.

In England, the post of Speaker of the House of Lords is held by the Lord Chancellor, or rather the Chancellor is always the Speaker of the House of Peers, who throws in his lot with the cabinet. When the Speaker is prevented from discharging his duties by absence, illness or other circumstances, the chairman of the House committee acts for him. The Speaker of the House of Commons is elected by the Commons and then appointed by Royal order. He belongs to no party and naturally stands in a fair and impartial position, which is unaffected by a change in the cabinet. When the Speaker is prevented from discharging his duties, the chairman of the revenue committee takes his place temporarily. The Speakers of both Houses perform their duties with the assistance of their secretaries, but their powers differ considerably. Whereas the Speaker of the House of Lords has only to carry out the decisions of the House in his capacity of represen-

tative of the House, that of the House of Commons possesses much more extensive and far more important powers. They are the powers (a) to issue orders to members, (b) to maintain order in the House, and (c) to certify bills. These powers the Speaker exercises as representative and leader of the whole House. Each House of Parliament has also different committees, which are (a) the House committee, sometimes called the annual revenue or the annual expenditures committee, as the case may be, (b) the investigation committee, and (c) the standing committee.

In the United States, the vice-President of the United States is appointed Speaker of the Senate, but in case the vice-Presidency is vacated or he is temporarily acting for the President, a temporary Speaker is elected. The Speaker of the Lower House, unlike that of the English Lower House, is himself a party man, and the Federal constitution provides that he be elected by and from among the Representatives. The usual practice is, however, that he is elected before the opening of the House in a preliminary election sponsored by the majority party, the House simply approving it later. Thus it is seen that the Lower House in the United States is characterized by the two main points that the Speaker is the leader of the majority party and that he is responsible for the proceedings in the House with the support of his party. Unlike the Speaker of the Senate, the former has the right to vote, and

when the vote is a tie, a bill is considered rejected. Every bill introduced in the Senate is submitted to one or another committee for deliberation according to the nature of the bill. The five most important of the Senate committees are the finance, budget, diplomatic, judicial, and inter-state trade committees. The membership of each committee varies from three to sixteen or seventeen. In case of necessity a general House committee meeting is called, attended by all the members.

In the United States Lower House there are more than sixty committees, the most important of which are those concerned with finances, budgets, regulations, the judicature, banks and money, inter-state and overseas trade, harbours and rivers, post-offices and postal routes, agriculture, the army, and the navy. Besides these, there are certain committees necessarily increasing in importance according to political conditions. The membership of each committee varies from two to thirty-five. Appointment of committeemen is, as in the case of those in the Senate, made in a preliminary election sponsored by the majority party. Besides these committees, a general House committee meeting is sometimes called, attended by all the representatives in the capacity of committeemen.

CHAPTER XVII

THE MINISTERS OF STATE

SECTION I THE CABINET

HE Cabinet is a consultative machinery composed of Ministers of State having for its object deliberation on matters incidental to their duties. Since it is the duty of Ministers of State not only to act in an advisory capacity to the Tenno but also to take charge of administrative affairs and to direct and supervise subordinate government offices each as head of one branch of the administration, the Cabinet is, in this sense, a machinery for the administration of state affairs.

Matters to be referred to the Cabinet council, as stated in Article V of the Government System of the Cabinet are: (a) bills and budgets, (b) foreign treaties and other important international agreements, (c) government machineries and Imperial Ordinances regarding the execution of laws and regulations, (d) controversies among Departments of State over powers under their control, (e) petitions of the people forwarded by the Tenno or the Teikoku Gikai, (f) extraordinary disbursements, and (g) appointment and removal of officials of *chokunin* (勅任) rank (Imperial appointment) and prefectoral governors. But these are the only salient items. Of these,

the fourth comes under administrative affairs, and so it is under the jurisdiction of the Cabinet, which is an administrative machinery, but all the rest are attended to by the Tenno as part of His state acts. For the Cabinet, therefore, to give deliberation on these matters amounts to giving its advice and assistance to the Tenno.

The function of the Prime Minister in the Cabinet is defined in Article II of the Government System of the Cabinet, thus: "The Prime Minister shall maintain the unity of the different branches of the administration by the command of the Tenno." It is clear, therefore, that the system of the Cabinet is a unified machinery headed by one chief. Since it is a unified machinery the whole en bloc ought to assume joint responsibility for important state affairs.

In England the central machineries of the executive are the King, the cabinet, cabinet ministers, and other heads of central administrative organs. The cabinet is a consultative machinery composed of cabinet ministers. As in Japan all cabinet ministers are at once heads of different departments. In England, however, a unique cabinet system seen no where else has been established as a result of peculiar historical changes. It is true that all cabinet ministers in England have seats in either the Upper or the Lower House of Parliament and are the King's privy councillors, but the cabinet cannot be called on that account a committee of the legislature or of the privy council. The cabinet is the

guiding and directing power in government. Originally the present cabinet system was developed out of the old time privy council. Tudor Kings in the sixteenth century made the privy council the instrument of autocratic government, but down to the time of the Stuarts the enormous increase in the number who participated in the privy council necessitated the choice of a few out of these many to take part in administrative affairs. With the restoration of Charles II. in 1660, this system came to be regarded with jealousy and discredit, and, though the King felt the political necessity of appointing a large number of privy councillors, he hated the vociferous discussion usual in the privy council and preferred to expedite the transaction of state business. Finally on Clarendon's proposal, the administrative affairs of the privy council were assigned to four special committees on foreign affairs, control over the army and navy, commercial affairs, and investigation of petitions of the people, respectively, which is believed to be the origin of the present administrative system. Then by degrees the cabinet became independent of the privy council until it has become today the most important central machinery of administration.

The American cabinet, on the contrary, is a mere executive machinery of administration and cabinet members are but the highest government officials under the control of the President. The fact is that the cabinet, not being provided for in the consti-

tution nor in any other law, is incapable of doing anything without the consent of the President. In France the Liberals adopted after the fall of Napoleon the system of a responsible ministry as in England, but it made no satisfactory development, for at first there were no indications of the decline of the royalists' power, the autocratic sovereign power reigning supreme as may be seen in the restoration to power of the Bourbons and the Orléans, and the Second monarchical regime of Napoleon III. respectively. On the appearance of the present third republic, however, the constitution, promulgated February 25, 1875, was made to embody clearly in written form the principle of this system. Thus the Constitutional Law of February provided in Article III as follows: "Every act of the President of the Republic shall be countersigned by a minister." And in Article VI: "The Ministers shall be collectively responsible to the Houses for the general policy of the government and individually for their personal acts." The President was thus made entirely nonresponsible for his political actions, full responsibility being shifted to the ministers of state. The following functions belong to the cabinet: (a) that the cabinet shall exercise the legislative and executive power in the name of the President and assume responsibility for all laws and ordinances issued by the President; (b) that the cabinet shall have the legislative initiative in the National Assembly, be under obligation to be criticized as an administrator regarding

the execution of law, and hold such a position; (c) that the cabinet shall control the enforcement of the administrative power, with each member as head of one branch of the administration, and command and supervise permanent administrative officials. The French constitution, however, provides little for the cabinet council and nothing for cabinet organization, so that the laws are comparatively flexible in this direction.

SECTION II THE STATUS OF A MINISTER OF STATE UNDER NATIONAL LAW

Ministers of State are agents of advice to the Tenno regarding the exercise of the supreme power over state affairs and are responsible for the exercise of this power.^① By *advice* it is meant that Ministers, like advisors or councillors of State, lay their views before the Tenno and thus place full information before Him. The advice of Ministers of State differs from the consent of the Teikoku Gikai. The latter has a definite form and can only act in conformity with this form, while the former has neither a definite form nor a definite effect. Accordingly Ministers of State may lay their views, freely and independently, before the Tenno according to their own judgment. It is one feature of the Constitution that the Tenno is always, not arbitrarily, but with

^① The respective Ministers of State shall give their advice to the Tenno, and be responsible for it. See the Japanese Constitution, Art. LV, Sec. 1.

the advice of Ministers of State, understood to exercise the supreme authority. If there be any fault in the exercise of this power, the Ministers of State must be responsible for it on the ground that they have given wrong advice.

Advice to be given by Ministers of State covers the whole sphere of state affairs. By *state affairs* is meant affairs of state in the essential sense of the word, i.e. all except those coming under the Imperial House Law and the military command. Ministers of State are on one hand under obligation to give their advice regarding the exercise of the supreme power and, acting for the Tenno on the other, to take charge of some administrative functions and to direct and supervise subordinate government offices as heads of the different branches of the administration. Their advice to the Tenno, therefore, covers the same sphere as the authority of the different departments. In other words, Ministers of State are under obligation to give their advice to the Tenno on all state affairs as above specified. As to their duties, there are no allotments among the Ministers nor have those duties any relation to matters within their competency: all Ministers of State may on equal terms give their advice to the Tenno on all state affairs.

In England, early in the Stuart dynasty, many scholars advocated that ministers of state giving their advice to the King must be responsible to Parliament not only for matters of law but also for

those of administration. They maintained that the principle of responsible ministers was the fundamental spirit of constitutional government and diverse sacrifices were made for the realization of this principle with a final success in the well-known impeachment of Danby. Danby not only encroached on the sovereign power by negotiating with foreign monarchs and envoys on matters of peace and war, but incited the government to resort to arbitrary and tyrannical measures, wasted state funds, and misappropriated certain expenses decided on by Parliament for the dissolution of the army, till he became the target of hostile criticism. In his attempt to release himself from the responsibility, he pleaded an order of the sovereign, but was impeached at last, which went far to establish the principle that no minister of state shall be permitted to shield himself behind the throne by pleading an order of the sovereign and that every minister of state shall be responsible not only for the legality of all the policies carried on in the name of the King, but for their justice, honesty, and utility. This cabinet system, for all its merits, saw no remarkable development during the reign of Queen Anne; for she would not leave her suggestions on state affairs to the ministers, but herself often presided over the cabinet council, directed them to decide on policies she proposed and made them carry them out. Then came the success of the Whigs in causing cabinet ministers to be elected from among members of political parties re-

gardless of the queen's intentions, which led to the establishment of the new usage that the King stands independent of all political responsibilities. Here it must be noted that it was a remarkable fact that Queen Anne was the first in English history not only to reign but also to govern. Later when George I., the German who neither understood English nor took any interest in English administration, ascended the throne, the principle—"The King reigns, but does not govern"—was founded on a sound basis.

The cabinet system established through such a process makes the advice of the cabinet a pre-requisite to all administrative functions of the King, and holds the cabinet responsible to Parliament for such advice. The English cabinet is now a *de facto* organ which performs all administrative functions, the unwritten constitution having undergone a great change in its interpretation, with particular reference to the advice of the cabinet. Accordingly the King can do nothing without the consent of the cabinet. Still the form is retained that the authority of the cabinet legally consists in giving advice to the King and that the administrative power is vested in the King. This advice of the cabinet concerns all functions of the rights appertaining to the King's sovereignty except legislative acts of Parliament and judicial functions of courts of justice.

As has been stated before, the cabinet is responsible to Parliament for all the acts of the King, who is the state machinery, and it is for this very

reason that the cabinet requests the King to perform its administrative functions. In this latter case, according to usage, the King cannot reject the request. We have seen that in America no provisions are made regarding the cabinet in the constitution or in any other law. It is but an executive device for the exercise of the will of the President in its entirety. In France, as in England, parliamentary government is in operation. There the National Assembly is vested with not only the power of a legislature but also the power to cause the government to administer state affairs and to call it to account for its actions. This system of a responsible cabinet is an embodiment of the fundamental principles of the French cabinet, but the system itself is nothing but an imitation of the method of operating constitutional government which has attained perfection in England. Thus, in practice, all laws and ordinances issued by the President require the countersignature of Ministers of State, who are held responsible to the National Assembly for their administrative functions in general.

SECTION III APPOINTMENT AND DISMISSAL OF A MINISTER OF STATE

The appointment and dismissal of Ministers of State come within the supreme power of the Tenno, but, as to who shall be Ministers, there exist certain traditions. To be more precise, constitutional government which respects the will of the people,

cherishes constitutional custom, according to which the formation of a Cabinet must be supported by the Gikai, especially the House of Representatives, and whoever is capable of control over a majority in the House of Representatives is made Prime Minister. As a general rule, the president of a political party or whoever may be capable of control over a majority in the Gikai accepts an Imperial command to form a Cabinet, in response to which he chooses his Cabinet Ministers and reports his selections to the Throne, their appointment being made upon that report. As to who shall be nominated Prime Minister, there is no one who possesses the power legally to submit such a suggestion to the Throne. The Lord Keeper of the Privy Seal, whose duty it is to give advice to the Tenno, ought to answer His inquiry on the matter, but the matter being too important for a single person to attend to, recent usage demands that it be first referred to the so-called *genro*, i. e. elder statesmen, or other important persons before recommendation is made to the Throne.

A Cabinet formed on the confidence of the Gikai is called a Gikai Cabinet (or a party Cabinet) in distinction from a bureaucratic Cabinet (or a non-partizan Cabinet), which is formed regardless of the Gikai support. In a Gikai Cabinet the president of the majority party in the House of Representatives ordinarily assumes Premiership with leaders of the same as Cabinet Ministers. In the absence of a majority party, two or more parties

may combine to form a Cabinet. In France, where there are many small parties, a cabinet is formed by a combination of two or more parties, it being impossible for any one party to enjoy a majority in the National Assembly. Such a cabinet is generally called a coalition cabinet. A Gikai Cabinet continues to exist or resigns according as it enjoys or loses the confidence of the Gikai while a bureaucratic Cabinet stands quite independent of the confidence of the Gikai.

No definite conditions or qualifications are required for recommendation to the office of a Minister of State. Any Japanese subject, except one deprived of or disqualified from public rights, a naturalized subject, and one not Japanese by birth, may be appointed Minister of State. However, the portfolio of War is held by either a general or a lieutenant-general and that of the Navy by an admiral or a vice-admiral, according to the official organization of the War and the Naval Departments. According to Article XIV of the Formal Act, formal appointment of a Minister of State, except the Prime Minister, is made by a written official announcement bearing the countersignature of the Prime Minister, while that of the Prime Minister is made by a like announcement bearing the countersignatures of Ministers of State remaining in office, if any, and that of the Lord Keeper of the Privy Seal in case there are none remaining.

In England the cabinet must necessarily be

supported by the majority party in Parliament. This is quite essential to the parliamentary government of today as otherwise the cabinet cannot successfully hold to its principles and carry out its policies. In order, therefore, that the cabinet may act in concert with the majority party in Parliament and may on its behalf show the same political leanings, every cabinet minister should have a seat either in the Upper or the Lower House. This principle has not always been realized in the past; there have been some who did not have seats in Parliament. For instance, Sir William Harcourt had no seat in Parliament when he was Home Secretary in 1880. About this time the principle was established in England that when a new cabinet is necessitated by the resignation of a cabinet, the ex-prime minister should, according to the constitutional usage, recommend the president of an opposition party as prime minister in the succeeding cabinet. The successor apparent thus recommended was immediately called to the palace to accept the Royal command to form a new cabinet, and having thus obtained the position of prime minister, make a selection of the personnel for his cabinet and other chief administrators, appointment thereof being made later by the King on the prime minister's report. The cabinet ministers thus selected by the prime minister are usually of the same party. In America the first established of all the central organs of government were the State Department, the Treasury Depart-

ment, and the Department of War, which were decided upon in the first session of Congress in 1789. Then other departments followed one after another till they now count ten in all. Of the heads of these departments, the Secretary of State and the Postmaster-General are appointed by the President with the consent of a majority in the Senate. The appointment of the heads of other departments and bureaus is also made by the President with the consent of the Senate from among the members of his own party. The appointments are allotted in equal proportion over all the states to those who have rendered good services in the Presidential election so as to ensure fairness. Sometimes he chooses a member of an opposition party. The heads of departments and bureaus thus appointed share their fate with the President. Their tenure of office is usually limited to a term of four years, but they may sometimes remain in office for two terms successively or sometimes be dismissed by the President before the expiration of their term of office, on account of misdemeanour. President Wilson removed from office Robert Lansing, Secretary of State, who summoned a cabinet council without consulting the President because of his being the senior member of the cabinet.

In France the constitution has provisions regarding the cabinet council, but no reference is made to the method of cabinet formation and the number of cabinet members. This is because the

President appoints all military and civil officers, ministers of state among the number. However, it does not follow that he makes a free selection of cabinet members for appointment. To be more particular, the President selects the prime minister only, who in turn selects the members of his cabinet. The necessary formalities to be gone through are about the same as in England, but a peculiar political condition necessitating minority parties makes it impossible to go through them exactly as smoothly as in England. Here the government rests on the support of the majority party in the Chamber of Deputies, and, in case a majority is unobtainable, the cabinet must resign *en bloc*. Accordingly, whoever is charged with the formation of a new cabinet by the President must first effect a coalition of several parties and then get his cabinet members from each of those parties or at least get a pledge of support from such parties as will not send in any cabinet member—all this to ensure a majority in the Chamber of Deputies. It sometimes happens that, after acceptance of the command to form a new ministry, he must be declined because of failure to coalesce different parties. When the prime minister-elect is convinced of the support of a majority in the Chamber of Deputies, he presents to the President a list of names of the members-elect of his cabinet, upon which their formal appointment is made with due ceremonies by the President, who, it must be noted, cannot refuse to appoint any minister selected

by the prime minister. The cabinet thus formed asks again for support in the Chamber of Deputies, and if it is approved of by a vote of confidence, the foundation of the cabinet is made secure and continues to exist as long as it enjoys the confidence of the Assembly.

The members of the cabinet vary in number. The President decides each time the number and the power to be allotted to each member in conformity with the advice of the prime minister. In pre-War days the number was usually twelve, but later a few additions have been made. It is the rule that the prime minister is minister concurrently of one or another of the different departments at his own discretion and exercises jurisdiction over it. When he does not hold the portfolio of justice simultaneously with the premiership, the minister of justice occupies the position next to that of the prime minister in cabinet standing and is recognized as vice-Premier. Ministers are selected from among members of either House, but the practice is not so strict as in England, for promotion is often given to administrative officials. However, the ministers of war and of the navy are selected from among military and naval officers, although in recent years the tendency to appoint civil officers has been prevalent from the consideration that the office of a minister being of a political nature, statesmanship, rather than professional knowledge or experience, is the first essential.

SECTION IV THE RESPONSIBILITY OF A
MINISTER OF STATE

Every Minister of State is on the one hand charged with the important duty of giving advice to the Tenno, and on the other assumes the absolute responsibility of maintaining the prestige of the department of which he is head and which is one of the highest administrative machineries. He assumes responsibility as adviser to the Tenno for all acts he performs on the Imperial decision, as having personal initiative in his *ex-officio* acts, and as a supervisor of the acts of his subordinates.

Various theories are advocated on the legal question of the responsibility with which Ministers of State are charged in the exercise of the supreme power by the Tenno. One of them claims that since in a monarchy the sovereign who combines in himself the rights of sovereignty, is sacred and inviolable, no one can lay the responsibility on him and therefore there is need of some other person responsible for the acts of the state, and that this person must be a Minister of State. Another holds that whoever is responsible for an act must be the performer himself and that therefore a Minister of State must be responsible for his exercise of national rights as the actual performer, and not the sovereign, who holds no position in that respect. Neither of these views is quite adequate and tenable, for the former lacks the reason for the responsibility of Ministers of State and the latter regards the sover-

eign as a kind of titular function because of the responsibility assumed by Ministers.

The responsibility of Ministers of State is absolute, and they cannot shun it by pleading an Order of the Tenno. Ordinary government officials are under obligation to obey superior officers' orders in discharging their duties, but are not responsible for any act they may perform in obedience to orders from above, the responsibility being shouldered by whoever issued those orders. Ministers of State, on the contrary, hold themselves responsible for their very act of giving advice to the Tenno. Indeed it is for the purpose of giving advice to the Tenno that they are in their service as heads of the different departments in obedience to the Imperial command. As for the Tenno, it need hardly be said that He does not always act on their advice as He is under no restraint whatever which makes it necessary for Him to act on it. Even in this case Ministers cannot release themselves from their responsibility by pleading an Order of the Sovereign: far from it, they hold themselves responsible for the inferred fact that their advice was improper or inadequate. Regarding this, the Japanese Constitution says: "The respective Ministers of State shall give their advice to the Tenno, and be responsible for it."^① There are no provisions in the Constitution as to what kind of responsibility they should assume, and here step in other laws, ordinances, and customs to decide it.

^① The Constitution, Art. LV, Sec. 1.

Responsibility means bearing the consequence of one's own act according to the critical judgment passed by others on that act. The consequence to be borne is sometimes in the form of a sanction legally enforceable or sometimes in the form of one that is condemnatory. When the system of impeaching Ministers is established by national law, they must be impeached; when sanctions—civil, criminal and disciplinary—are in force, they must also receive them. These are generally called legal sanctions. In the latter case, the responsible person is simply condemned for his act and urged to resign, which is not a legally effective sanction. However, when a state organ, invested with the power to criticize and condemn the acts of others, is established according to national law and is made to exercise that power legally, the sanction thus invoked is properly called condemnatory. As to legal responsibility, Ministers of State, like other government officials, are ordinarily sent for trial for criminal and civil matters, and, as to breach of duty as government officials, they are responsible exclusively to the Tenno. They can be removed from office at any time, not being guaranteed in their positions, which accounts for the fact that the Ordinance on Civil Officials' Discipline is not applied to Ministers of State.

The responsibility peculiar to Ministers of State is a political one which they assume to the Gikai. The Gikai can call them to account for their responsibility by means of a question, or a resolution of

no confidence, or of an address to the Throne impeaching them. In other words, they are to assume their responsibility to the Gikai. However, this power of the Gikai to censure is not legally very effective, for even if it passes a vote of non-confidence in ministers, the latter are under no obligation to resign, nor is an address to the Throne impeaching them binding upon the Tenno. The responsibility of ministers to the Gikai is not recognized by national law as a legal necessity, but as the government finds it always impossible to execute its policy in the face of opposition by the Gikai, the lack of confidence of the latter is fatal to the former. In short, ministers are legally charged with the same responsibility as government officials in general, but differ from the latter in that they assume a political responsibility rather than a legal one, viz., responsibility to the Gikai.

In England, which has a cabinet system all its own, the ministers form a body with the prime minister above them under the so-called system of joint responsibility. Formerly ministers of state assumed as a rule each his own personal and partial responsibility. Sir Wm. Temple insisted in 1806 that the cabinet had no responsibility as a body, but that ministers had responsibility as government officials of the King, which was but another way of saying that the ministers had each a separate responsibility, but not a joint one. In spite of the vigorous opposition by Walpole, this principle of a partial responsibility prevailed, due chiefly to frequent frictions

among ministers, there being no immediate prospect for the system of joint responsibility replacing the former. It is not known when the principle of joint responsibility was established in England, but according to Prof. Hearn, it was at the time of the second Rockingham Ministry in 1782. Prior to it, in 1763, Pitt the Elder accepted a Royal mandate to form a new ministry, when he attempted to realize this same principle on the belief that the ministerial group must act as a body, but it was rejected by George III. As Sir John Morley said, the important policies of each department call the cabinet as a whole to be responsible for them, and so the members of the cabinet must all take the same course of action.^① The cabinet is one body to the sovereign: it is the same to the legislature. Therefore the cabinet must give its advice to the King as a body, as also it must to both Houses, and, in case the advice is not accepted, must be responsible for it.

SECTION V THE POWERS OF MINISTERS OF STATE

Ministers of State should give their advice on all acts of the Tenno in relation to state affairs. Here exists a clear distinction between the responsibilities and powers of Ministers of State and those of the heads of different departments. Ministers of State are not mere administrative organs, but advisory ones, having in view all the affairs of the

^① J. Morley, *Walpole*, pp. 154-8.

state, while the heads of different departments simply attend to the administrative business coming within their respective competency. Such indeed is the difference between the two; but they are too often confused, identical persons invariably assuming the two functions. Sometimes a Minister of State who has no particular sphere of jurisdiction, viz., a minister without portfolio is created, which fact shows that the two are separate organs. Ministers of State have each an equal amount of power to give advice to the Tenno, and not one of them can direct the rest of the cabinet, by occupying a higher place. Even the Prime Minister is on an equal footing with other Ministers of State in so far as the power to give advice to the Tenno is concerned, although, indeed, he occupies a special position in the cabinet, and possesses a special right with regard to the actual exercise of his advisory power, which distinguishes him from other ministers.

According to the machinery of the Cabinet, the Prime Minister has a special authority to make representations to the Tenno on matters of State as head of the ministers. That is to say, the Prime Minister as head of the Cabinet makes reports and recommendations to the Tenno on the appointment and dismissal of Ministers, endeavours to maintain the unity of the different branches of the administration, and presides over and directs the Cabinet Council so as to bring about agreement in opinion among the Ministers of State. By *representations*

to the Tenno on matters of state is meant such reports as the Prime Minister makes to the Throne of his own or all other ministers' opinions about the acts of the Tenno relating to affairs of state. It may be noted as an exception that the Ministers of War and of the Navy only are entitled to make direct representations to the Tenno, quite independently of the government, on such matters as concern military orders and secrets.

In England, as in Japan, the cabinet ministers, who assume, as stated above, a joint responsibility to the King and to Parliament, are invested with the power to give advice to the King on all affairs of state. The characteristic feature of the cabinet system is that the prime minister occupies a superior position over the others. Until 1905 no mention was made of the standing of the prime minister in the list of court standings, it being open to question whether in England premiership was a government office at all. Certainly the name *prime minister* is now used in official documents, but a mere prime minister cannot take his place in the cabinet, unless he concurrently holds some government office, legally recognized. Accordingly it may be said that England has no such government office as premiership. The prime minister usually holds the portfolio of finance additionally.

Whatever the status of the premier may be, he is in practice connected with all the organs of state, holds the power to alter laws and to impose and

abolish taxes, and is able to control all the organs of state. Therefore the prime minister of England may be said to have a power far greater than that of the President of the United States. He may be said to have a status comprising the four positions, i.e. (a) the head of the executive, (b) the chief of the legislature, (c) one to whom is delegated the supreme power by his electors, who are themselves a political sovereign, and (d) an adviser to the King and an intermediary to maintain the relations between the King and cabinet. In contrast to the increased power of the premier, it is but natural that the power of the King should have gradually been encroached upon. It may be pointed out that in England, which is a constitutional country with a flexible constitution, the personality of the premier decides the extent of his functions, and that of the King has a great bearing upon the application of the constitution. The King can, even today, make an appeal to Parliament against the cabinet by virtue of his constitutional rights. The King can thus exercise his supreme power in dismissing the cabinet on one hand and on the other in putting his veto on the dissolution of Parliament. The King has still the power to select and appoint the prime minister. The selection is limited to a very narrow scope, within which, however, the King exercises his power to the full. The system of joint responsibility of the English cabinet is also attended by exceptions, of which there are two, i.e. (a) that in case the administrative act of the

King constitutes a violation of law, the minister within whose jurisdiction the King's act in question falls is held singly responsible for it on his behalf, and (b) that when Parliament has passed a bill aiming at the impeachment of a particular minister, he must resign singly. In both cases the other ministers are in no wise held jointly responsible.

In America, the heads of the different departments constitute a cabinet according to an indirect statute, but they only have the power to control matters within their respective jurisdictions. The regulations of the cabinet stipulate that the members of the cabinet shall meet in council once or twice a week, and deliberate and give out their opinions on matters proposed by the President. Secrecy being observed with regard to the council, the proceedings are withheld from the public. No departmental chief is allowed to criticize or attack the President and his colleagues. He is responsible to the President and has to obey his orders implicitly.

In France, the responsibility of cabinet ministers is provided in Art. VI of the Organization of the Public Powers.^⑤ As stated elsewhere, the President of France, like the sovereign of a constitutional monarchy, does not hold himself responsible for his political acts, and instead the ministers of state assume the entire responsibility. The cabinet is responsible to the National Assembly for the general policies of the government, but one wonders whether what is known

^⑤ See Constitutional Law of February 25, 1875.

as the National Assembly, literally means conjointly the state and the Chamber of Deputies; for while the cabinet is absolutely responsible to the Lower House for the government's general policies, in practice this is not always the case with the Upper House. When the Lower House expresses lack of confidence in the cabinet, the latter must immediately resign *en bloc*, because it can not dissolve the National Assembly and consult the will of the people by means of a general election, as is the case in England; the cabinet has no power to dissolve the National Assembly. On the contrary, it does not necessarily resign when it has lost the confidence of the Upper House. Instances are very few where the opposition of the Upper House has caused the downfall of the cabinet: in most cases it continues to exist. The reason is that whereas the will of the Lower House, which represents the will of the people to a greater extent than the Upper House, is regarded as directly emanating from the people, the will of the latter is comparatively belittled, because the latter does not, in its essence, represent the people.

Recently a few scholars have come out with a protest against this practice as unconstitutional. They argue (a) that although in the monarchical days the Upper House was, as its name suggested, a House of Peers, representing the people in a perfunctory way, yet in these republican days both houses are evenly matched in representing the people except for a difference in the process of organization and (b) that

the Upper House's expression of lack of confidence in the cabinet should, like that of the Lower House, cause the immediate resignation of the cabinet. This sounds quite right when we interpret the provisions of the constitution literally, but government is not a mere theory, but a matter of practice. Further, in France, usage has a powerful influence upon actual government, and we have reason to suppose that the above argument will not prevail for a long time to come in spite of all possible efforts.

The constitution provides that the President can dissolve the Chamber of Deputies with the consent of the Senate. This power is, like other powers vested in the President, exercised by the cabinet in the name of the President, but under parliamentary government in a country like France it is practically impossible for the cabinet to exercise this power of dissolution. The fact is that since the cabinet stands on the basis of a majority in the National Assembly, it is open to question whether it can reap favourable results from dissolving the National Assembly, due chiefly to the peculiar political situation constantly affected by the union and disunion of numerous political parties. Actual exercise by the cabinet of this power of dissolution is a thing yet unknown in France, i.e. (a) to exercise the legislative and administrative powers in the name of the President with full responsibility for all laws and ordinances issued by him and (b) to have the right to initiate important legislation in the National Assembly being

in a position susceptible to criticism on the execution of laws as an administrative official, and (c) as head of the executive to supervise the exercise of the executive power and also to oversee and direct officials holding permanent posts.

The principal functions of the prime minister are, needless to say, to assume as head of the cabinet full responsibility to the National Assembly for legislation and administration and, in addition to this, to lead and control the ministers of the different departments so as to secure coöperation among them to ensure a smooth administration of state affairs. But the position of the prime minister in the cabinet, that is, his relation with his cabinet ministers differs from that of the premier of England. In England, the prime minister and his cabinet colleagues usually belong to the same political party, and are in perfect accord with each other as party leader and veteran members. Their interests, too, being in perfect harmony, the prime minister can exercise absolute power over his cabinet colleagues. In France, on the contrary, the cabinet is, so to speak, a house in which various kinds of men are boarding together, and its existence being entirely controlled by the will of the National Assembly, the position of the prime minister is very weak. Accordingly, the prime minister cannot give his sole attention to the control of his cabinet members, simply because he is always engrossed with studying how best to meet the National Assembly out of a desire for a long career for

his cabinet. Moreover, the cabinet ministers do not assume, as matters stand, joint responsibility for the government's general policies, for even if the cabinet should resign *en masse*, the ministers will be able to join the next cabinet when their respective parties support it. Thus it is customary for the ministers to simply hold themselves separately responsible notwithstanding the provision in the constitution that they shall "both collectively and personally" be responsible.

SECTION VI THE COUNTERSIGNATURE OF A MINISTER OF STATE

The following is provided in Section II of Article LV of the Japanese Constitution: "All Laws, Imperial Ordinances and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State." This is but determining the way in which the sovereign power is exercised by the Tenno by the issuance of writings. By *countersignature* is meant signing for confirmation by a Minister of State of his name to a writing issued by the Tenno in order to exercise the sovereign power. The Tenno's act on affairs of state is usually performed by means of writings called Imperial Rescripts. An Imperial Rescript may either be a *Shosho* (Imperial Edict) or a *Chokusho* (Imperial Autograph); the former pronounces the Imperial wishes on the execution of the supreme power, while the latter is connected with the duties of Ministers of State, and not pronounced.

The countersignature of a Minister or of Ministers of State attests, on the one hand, the sincerity of the act performed by the Tenno and, on the other, his or their responsibility for it. It often happens, however, that Ministers of State, being in duty bound to give their advice and assistance to the Tenno, ought to be held responsible also for those writings which bear no countersignature. The system of countersignature was created primarily to enable Ministers of State to have opportunities to give their advice to the Tenno and inform Him prior to the issuance of all laws and Imperial Ordinances and such Imperial Rescripts as relate to affairs of state. The question arises whether a Minister of State can refuse to countersign. It is sometimes said that a countersignature neither shows that the signatory, i. e. the Minister concerned gives his consent to the Tenno nor that he permits His act; that if he is commanded by Him to countersign in spite of the advice he gave Him, there is no choice left to him but to tender his resignation or to countersign; and that he is not, however, in a position even to resign at his own will, being obliged to remain in office and countersign should his resignation not be permitted. Still it may be argued that he can refuse to countersign, for a Minister of State, unlike general administrators, is under no obligation to obey the orders of the Tenno or of superior officers, and when he gives his advice to the Tenno, he does so simply on his own judgment and of his free and independent

will, which fact will justify his refusal. This argument must not be taken to invert the position of the Tenno and that of a Minister of State. The Tenno can at any time dismiss a Minister of State from his office and, what is more, He is at liberty to adopt or reject his advice. The provision that the Tenno cannot perform any effective state act without the countersignature of a Minister of State shows that He is bound by the Constitution which he Himself made. Countersignature covers the same sphere as the duty to give advice to the Tenno. Accordingly matters outside the charge of the Ministers of the different departments, such as those relating to the Imperial court or orders relating to the supreme command of the army and navy, require no countersignature. In England, too, the countersignature of a minister or of ministers of state is required for action on affairs of state, viz. in relation to all acts of the King coming within the scope of the responsibility due to ministers of state in giving him their advice. Such writings are of two kinds, Letters Patent and a Royal Warrant. The former requires the Great Seal and the countersignatures of the ministers of state and of the Lord Chancellor; the latter the Sign Manual and the countersignature of the Home Secretary. For instance, appointment and dismissal of military and civil officials are formally announced by means of Letters Patent, while the Right of Pardon, which usually calls for the advice only of the Home Secretary, is exercised by means of a Royal Warrant.

In France, too, the cabinet ministers are held responsible for acts performed by the President on affairs of state, and all documents issued on their responsibility bear their countersignatures, which serve to make clear who are responsible. In short, countersignature may be interpreted as stating clearly that ministers are held responsible for the President's state documents. But responsibility does not always depend on the fact of countersigning, and ministers may sometimes be held responsible without having given their countersignatures. The countersignature of a minister or of ministers of state is therefore a kind of form established on the basis of the constitution or constitutional usage.

CHAPTER XVIII

THE PRIVY COUNCIL

S an advisory machinery to the Tenno, there is the Privy Council. It is a consultative machinery under the Tenno's direct supervision and advises His Majesty concerning important state affairs. Privy Councillors have the status of state officials, but, having two functions. As a state machinery and as a machinery of the Imperial Family, they hold a double position. (a) Their authority as an organ of the Imperial Family has, according to the Imperial House Law and the Imperial Family Act, two sides, the right of voting and the right of replying to the Tenno's inquiry. When the Tenno is prevented from personally governing, they exercise their right of voting without hesitation and carry resolutions, which become legally effective, concerning (a) the decision to institute a Regency when the Tenno is prevented by some permanent cause from personally governing^① and (b) that of changing the order of one who should be Regent.^②

Privy Councillors reply to the Tenno's inquiry concerning (a) alteration of the order of succession,^③ (b) nomination and removal of an Imperial governor,^④

① The Imperial House Law, Art. XIX.

② Ibid., Art. XXV.

③ Ibid., Art. IX.

④ Ibid., Arts. XXVII, XXIX.

(c) recession and inclusion of other property in the Imperial Hereditary Estates and creation of the right of property on the land belonging to the said Estates,^① (d) amendment or enlargement of the Imperial House Law,^② (e) a member of the Imperial Family assuming the status of a subject,^③ (f) naming of a new era,^④ and (g) adjudication of the disappearance of members of the Imperial Family.^⑤ (b) Their authority as a state organ is provided for in Article LVI of the Constitution. They are to reply to the inquiry of the Tenno and deliberate upon important state affairs in accordance with the provisions for the organization of the Privy Council. The Privy Council goes no further than to reply to the inquiry of the Tenno, having no right whatever to make any proposal. Its resolutions may or may not be adopted by the Tenno according to the advice of the Ministers of State. Matters to be submitted to the deliberation of the Privy Council in conformity with the organization of the Privy Council (Article VI) are manifold. (a) matters coming within the powers of the Privy Council by virtue of the Imperial House Law and the Ordinances on the Imperial House and clauses in the Ordinance on the Imperial House specially referred to by the Tenno. (b) The draft of the provisions of

① The Imperial House Law, Art. XLVI and Property Act, Arts. VIII and XV.

② Ibid., Art. LXII.

③ Supplement to the Imperial House Law in the 40th year of Meiji, Arts. I, II, IV, and V.

④ Act of Enthronement, Art. II.

⑤ Imperial Status Act, Art. XXI, etc.

the Constitution and questions concerning those provisions. (c) The Laws and Imperial Ordinances incidental to the Constitution. (d) Revision of the official organization of the Privy Council and of the regulations for the business of the same. (e) The Imperial Ordinances based upon Arts. VIII and LXX of the Constitution. (f) Conclusion of treaties. (g) Proclamation of a stage of siege provided for in Art. XIV of the Constitution. (h) Important Imperial Ordinances on education. (i) Important Imperial Ordinances on the official organization of the different branches of the administration and on other regulations. (j) Imperial Ordinances concerning the standards for honours and amnesties. (k) Matters other than those enumerated above, when specially referred to by the Tenno.

The Privy Council consists of a President, a vice-President and twenty four councillors. Those who are appointed to this office must be veteran statesmen and men of wide experience over forty years of age. Every Minister of State, as a matter of course accruing from his duty, sits at the Council meetings and possesses the right to take part in voting, every Prince of the Blood above his majority, staying in the capital, being also entitled to sit at these meetings. The privy council in England is entirely different from that in Japan in its organization and authority. It is not a consultative organ of the King, but rather belongs to the executive as an administrative organ, but, the name being similar,

we shall give here its general description for convenience in comparison. The privy council consists of about three hundred councillors, among whom are all cabinet ministers, new and old, and other high officials, two Archbishops, the Bishop of London, peers, the highest judges and ex-judges, a few colonial statesmen, and those who have rendered meritorious services in politics, literature, science, military affairs, etc. The privy council was originally under the immediate control of the King, and was vested with the same authority as the present cabinet and with an extensive jurisdiction. Even now the cabinet is legislatively nothing but a committee of the privy council ; and all cabinet ministers are, as a matter of course, members of the privy council during their term of office. The development of constitutional government, however, caused the cabinet to become perfectly independent of the privy council and the jurisdiction of the privy council to be remarkably restricted.

The authority of the privy council is many-sided. It issues proclamations or administrative orders in the name of the King. Ceremonies are held in the privy council Office (a) when a bishop takes the oath of allegiance to the King for the consortium of his fief, (b) when a cabinet minister, sworn into his office, kisses the King's hand and receives from the King's hands the medal symbolizing his government position and (c) when a magistrate is nominated. Various other administrative functions are also carried

on there. According to Maitland, the privy council is vested by Parliament with (a) the right to enact general rules relating to the supervision of national workshops, (b) the right to issue special orders to local officials who are disobedient, (c) the right to give licences, (d) the right to order inspections, and (e) the right to order hearings on railway disasters. However, exercise of these rights by the privy council is only perfunctory, it being practically due to various government offices.

CHAPTER XIX

THE JUDICATURE

SECTION I THE JUDICIAL POWER



ROUGH survey of the systems in different countries reveals that few of them make a clear distinction between the executive and judicial machineries, but all agree on the principle of the independence of the judicature. The French constitution provides simply that the Senate may be constituted a court of justice to try either the President of the Republic or the ministers, and to take cognizance of attacks made upon the safety of the state.^① It provides for nothing further regarding the judicial organ, whose functions are, however, prescribed by law. The foundation of the judicial power was for the first time established by the first constitution of the Limited Monarchical Régime of 1791, in which it is provided that the judicial power shall be vested in judges elected from among the people, that it shall not in any case be used by the legislature or the king, and that the courts of justice shall not participate in the exercise of the legislative and executive powers. It is indeed based on this constitution that in France to-day there exists a clear distinction between the judicial courts with, over them, the Court of Cassation as the highest

^① Constitutional law of February 24, 1875, Article IX.

court and the special courts of administrative litigation with, over them, the Conseil d'Etat as the highest court. The Japanese Constitution provides thus: "No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law."^① This clearly testifies to the principle of the independence of the judicial and executive powers.

In England and the United States, too, there is a clear difference between common laws and administrative laws, as, for instance, in the case of a contract with the government, for the execution of which a special means is demanded, or as in the case of an action for damages against an illegal act of an official, which is distinguished from a similar case against a private person. As to the jurisdiction of a court of law, there is some difference between the laws of England and the United States and those of France. In France, where there are numbers of different courts each having a different jurisdictions, it is often difficult to decide to which court of law a case should belong. Accordingly, there has come into existence what is known as the Court for Decision of the Jurisdiction, where, as the name suggests, the jurisdiction is decided for every case that occurs. In this court the minister of justice acts as chief judge with an

^① The Constitution, Art. LXI.

equal number of jurymen elected by the Court of Cassation which is the highest court of law, and by the Conseil d'État, the highest court of administrative litigation. Such separate existence of the judicature and the court of administrative litigation shows that the judicial power must be independent of the executive power, and vice versa. Now the question may be asked: What is the judicial power? The answer may resolve itself into two, viz. the essential and formal meanings. If all the functions of the state may be called administration, the judicature may reasonably be administration minus functions relative to civil affairs and penal offences. Administration inclusive of these latter functions is carried on by the legislature which makes laws and regulations.

Thus it may be seen that there is little essential difference between the judicature and administration, but a further and narrower inquiry reveals the two in their respective lights. The former includes functions relating to search for offenders, their arrest, and prosecution together with their judgment and infliction of penalties on the one hand, and, on the other, functions relating to the maintenance of order with reference to civil affairs and supervision thereof together with adjudication in cases of dispute. The latter includes all other functions, such as relate to official organization, police, education, finances, diplomatic affairs, etc. Montesquieu, in his doctrine of the independence of the three powers, defined the judicature as the adjudication of the acts of private

persons, viz. civil and penal proceedings in contradistinction to administrative litigation and disciplinary punishment of officials, which are part of administration proper. ☺

A civil procedure is the administration of justice in a suit relating to a civil affair. A civil procedure, which is a term in private law, means a procedure whereby justice is administered to the demand made to a court of law for recovery of rights infringed in their relation to private law, while a penal procedure is, unlike the proceedings in administrative litigation and disciplinary punishment of officials, a procedure whereby penalties are inflicted upon individuals for their offenses, viz. the exercise of the state authority for penalties. Passing judgment in a civil suit is not necessarily the essential element of a procedure. Even when the demand of the plaintiff is recognized favourably from the outset, there may be a trial, while, on the contrary, there may be no trial even when there is a dispute. A legal procedure is an act of interpreting laws of a general and abstract nature so as to decide and dictate what is the most lawful way to dispose of the case in hand. In other words, it is an act of determining the legal relation between private persons and realizing it concretely. A penal procedure, unlike a civil procedure, does not exist for private persons, but both are the same in that they apply laws. Laws, therefore, exist for judges to rely upon as the basis of their decisions, and whenever an offense is suspected, the state on its

own initiative demands a court of law to use laws to make a decision and inflict a penalty on the offender. A legal procedure thus shows a fair and impartial interpretation of laws on the one hand, while on the other it orders the parties concerned to obey its decision. It is true that both administration and the judicature are within the province of legislation, but the two differ in that the former applies laws to certain particular cases so as to attain desired ends, while the latter restricts itself to the mere application of laws. Judges, unlike administrators, have not of their own discretion the freedom to decide whether or not they will act. The words *by law* met with in the Constitution do not mean the same thing as the application by a court of law of laws as the basis of making decisions. The basis of decisions, which is within the authority of the court of law, must, in the nature of what a legal procedure is, be general law, viz. not only written laws but the customary law and even reason.

In England, too, acts of Parliament, Royal ordinances, and even common law and equity serve as the basis of decisions. *Common law* is a generic term for all regulations other than acts of Parliament, Royal ordinances, and regulations promulgated by the provincial authorities. In the Dark Ages of Medieval England only such laws were enacted by the King as were intended for certain special, and for that matter extremely limited, objects, and all ordinary cases in human society were disposed of by time-honoured

unwritten laws, different shires and different peoples being subject to different laws. It was, indeed, Henry I. who unified these laws into common law. This common law later became incorporated with new precedents, thereby increasing in volume and solidity; and although acts of Parliament showed a marked increase since the first half of the thirteenth century, common law was constantly developing, serving judges as important precedents together with the statutes. That is because unwritten laws were not only applied to cases of common occurrence but also to cases with no previous parallel, and the decisions handed down to these cases became part of common law, serving as precedents for similar cases occurring later. Common law, which may be said to have been made by judges, grew in importance as time passed, and now it forms the essential part of national law.

In the United States, the Federal government and the state governments divide the judicial power between them in its practical application, so that it is a great question to what extent this power is exercised by the judicial organ of the former. Regarding this, the Federal constitution provides thus: "The Judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."^① The constitution further enumerates the following cases as

^① The Federal Constitution, Art. III, Sec. II.

coming within the judicial control of the Federal government, viz. (a) all cases affecting ambassadors, other public ministers, and consuls, (b) all cases of Admiralty and maritime jurisdiction, (c) controversies between two or more states, (d) controversies between a state and citizens of another state, (e) controversies between citizens of different states, (f) controversies between citizens of the same state claiming lands under grants of different states, (g) controversies between a state, or the citizens thereof, and foreign states, citizens or subjects. All these cases, even if first brought before a state court, may be referred to a federal court for final decision. For instance, if an individual or a corporation is sued in a state court in such a manner as to infringe the right of not due "deprived of life, liberty, or property, without being process of law," which is guaranteed by the constitution, a federal court may be appealed to for redress.

SECTION II THE INDEPENDENCE OF THE JUDICIAL POWER

The division into parts of the judicial power and the assignment of them to different special courts was first advocated by Montesquieu, and constitutes one essential element of constitutional government. The Japanese Constitution says, in Article LVII, on this principle thus: "The Judicature shall be exercised by the Courts of Law according to law, in the name of the Tenno." This article, which aims

at the separation of the judicial from the executive power, claims that the courts of law should independently conduct legal proceedings, whether civil or penal, without asking for an Imperial order. The words *in the name of the Tenno*, are equivalent to saying *as the proxy of the Tenno*, and indicates that the judicial power originally belongs to the Tenno. All government offices, where the sovereign power is exercised and obeyed, function, in principle, in perfect obedience to Imperial order and in perfect observance of distinctions of order, high and low. The courts, on the contrary, execute the power as proxies of the Tenno in accordance with the commission of the Tenno without waiting for an Imperial order.

The courts thus exercise the judicial power in accordance with such a commission and by law. The words *in accordance with law* mean not only to act in accordance with the provisions of law but to act in complete disregard of other authorities. What is termed law in the article of the Constitution before mentioned embraces not only laws in their formal sense but also laws in their essential sense, viz. all laws in general. In other words, all laws, ordinances, treaties, and even customary law and, especially, reason are resorted to as the basis of decisions.

Article LVIII of the Constitution provides thus: "No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment." By this is guaranteed the position of the judges so as to ensure strict impartiality in giving

decisions. Originally a distinction is made between *kan* (government post) and *shoku* (office), and so it may seem at first sight that this article provides for the guarantee of the office only, but it certainly embraces the guarantee of the security of the post. Consequently, the provisions of Law No. 6 of the 2nd year of Taisho (1913), by which judges and public prosecutors may be compelled to retire by the decision of a general meeting of the Court of Cassation, and the addition to Article LXXIV, Section 2 of the Constitution of the Court of Justice decreed by Law No. 101 of the 10th year of Taisho (1921), in which the age-limit in judicial service is determined so as to relieve judicial officers reaching a certain age of their office, give rise to a suspicion of a violation of Article LVIII of the Constitution.

In England, too, the judges have been, since the Act of Settlement, free from all influence of the executive and from fear of removal from office. The judiciary, in England, stands quite independently of the executive, whose authority cannot control legal proceedings. Such independence is well illustrated by the following four points, viz. (a) absolute freedom of the functioning of judicial officers, (b) absolute independence of their positions, (c) their right to examine laws, and absolute authority in the passing of judgments. As to (a), it is clear that the judges can, under the protection of law, exercise their rights freely, independently, impartially, and without fear. The judiciary is thus empowered to give decisions

without any interference from the executive. As to (b), it may be pointed out that in order to enable the judicial officers to perform their functions independently, it is of imperative necessity to solidify their positions. In England, too, the term of office of the judge of the high court of justice has been made to run for life, since, the Act of Settlement, on condition of good behavior, and has made it impossible for the executive to dismiss them freely, an address to the Crown by both Houses of Parliament being the only way left to attain this end. This is provided for in the Act of 1875 on the high court of justice. As to (c), it may be mentioned that it is because of the functions of the judges being independent of the executive power that the effect of legal processes and decisions has been firmly established independently also of the executive power and that if a decision must be altered at all, it can be done only by a legal procedure such as appeal or retrial, there being no room for interference by the executive power.

The constitution of the United States also guarantees the independence of the judicial power, pitting it against the legislature and the executive. Congress and the President are not the final judges of the validity of the acts of these two organs: it is for Congress to make laws and it is for the President to carry them out. Whether these acts of the legislature and the executive are against the constitution or not is within the authority of the judiciary to decide. The provisions of the constitution relative to the

judicial power are merely provisional, and say nothing definite concerning the number and organization of federal courts and their mutual relations, except that the judicial power of the Union is vested in one supreme court and in such inferior courts as congress may from time to time ordain and establish. In other respects, however, the constitution may fairly be said to show good sense, especially in (a) that the judicial power is vested in the federal government; (b) that one supreme court is established over inferior courts which may be created, if need be, (c) that all the judges can hold their offices conditional only on good behaviour, (d) that the crime of treason is clearly defined, (e) that the rights of citizens are safeguarded by the provisions for carrying out examination, and (f) that the extent of the judicial power of the federal government is clearly outlined.

SECTION III THE MACHINERY OF THE COURTS OF JUSTICE

There are two exceptions to the principle of the judicial power being within the authority of the courts. One is special trial and the other, provisional disposition. Besides these, the jury system should be mentioned with regard to penal procedure. Except those specially provided, all government offices possessed of the judicial power with regard to civil and criminal cases are called ordinary courts, which are virtually what are termed *court of law* in Article LVII of the Constitution.

The machinery of ordinary courts is in Japan proper determined by the Constitution of the Court of Justice. These courts are classified into four grades, from the lowest upward, viz. district courts, local courts, courts of appeal, and the Court of Cassation. These grades are primarily for meeting the requirements varying with the grades of importance of cases and for correcting mistakes that may occur in giving decisions. The term *court of justice*, from the viewpoint of the Code of Legal Procedure, points to a single judge presiding over a district court and a consultative court composed of a certain fixed number of judges. A preliminary judge must be regarded also as a court of justice.

(1) *A district court, where a single judge gives hearings, disposes of minor cases, civil and criminal, by the exercise of the judicial power for the first trial. It deals with matters outside of legal procedure.*

(2) *A local court, where a joint hearing is conducted, is divided into one or two civil and criminal sections, each composed of three judges. The power of each section is as follows.* (a) In civil cases, the judicial power is used with regard to the following particulars. (a) The first trial of claims coming within the power of a district court or of a court of appeal, except civil cases affecting Princes of the Blood. (b) The second trial of appeals from judgments of district courts and protests prescribed by law against decisions and orders by local courts. (b) In criminal cases, the judicial power is used with regard to the

following particulars. (a) The first trial of all criminal cases not coming within the power of district courts and the special power of the Court of Cassation (b) The second trial of appeals from judgments of district courts, and protests prescribed by law against decisions and orders of district courts, except those coming within the power of the Court of Cassation.

(3) *A court of appeal, where the joint hearing is conducted, is composed of one or more than two civil and criminal sections, each composed of three judges. It has the power to dispose of the following particulars.* (a) Appeals from judgments in the first instance in local courts. (b) Protests prescribed by law against decisions and orders given in the first instance by local courts, except those coming within the power of the Court of Cassation. Besides the above, the Tokyo Court of Appeal has the judicial power to conduct the first and second trials of civil cases affecting Princes of the Blood. However, the legal procedure for the preliminary trial is the same as in local courts, while that for the second trial requires a special joint hearing by more than five judges.

(4) *The Court of Cassation, where the joint hearing is conducted, consists of one or more than two civil and criminal sections, each with five judges. It has the judicial power with respect to the following particulars.* (a) Final trials of (a) appeals, (b) protests prescribed by law against decisions and orders of the courts of

appeal and against those given in the second trial by local courts, and (c) protests against decisions to dismiss appeals. (b) (a) The preliminary hearing and trial of cases mentioned in Articles LXXIII, LXXV, and LXXVII to LXXIX of the Criminal Code and cases involving punishment, above imprisonment, of crimes committed by Princes of the Blood, (b) trial of appeals from decisions of local courts regarding lists of electors of members of the House of Representatives, and legal proceedings relative to election and election suits, and (c) trial of appeals from complaints, hearings, and judgments of the Patent Office.

Every court has a public prosecutor's office attached to it. The chief duties of a public prosecutor with reference to criminal affairs consist in searching for crimes by directing the judicial police, prosecuting them, and instituting necessary proceedings to effect the prosecution, and directing the execution of sentences. With regard to civil affairs, a public prosecutor may ask for permission to express his opinion. A public prosecutor, unlike a judge, is under obligation to obey the orders of superior officers, but as in the case of a judge he is not dismissed from office, except for punishment or for discipline.

According to the Constitution, "Trials and judgments of a Court shall be conducted publicly." This provision clearly aims at the maintenance of impartiality in the legal process, by preventing possible

irregularities, so as to uphold the dignity of the judicial power. In case, however, there should be fear of a public trial leading to disturbance of public peace and order or to a violation of public decency, it may be closed from the public by law or by the decision of the court. This exception simply concerns the examination of the parties at law, so that the pronouncement of judgment must at all events be made in public. In England, the constitution of the courts is very complicated, and it is very difficult to give any systematic account of it. In order to facilitate understanding, the lowest court will be first taken up and then in an ascending order.

(1) *The criminal courts.* (a) The justice of the peace. This is the lowest court of law, to which post is appointed, a volunteer in the locality, by the chancellor, in the case of a district; in the case of a county or shire, the president of the district or county assembly; and in the case of a town or a city, the chief of a ward. In a large city, the justice of the peace is assisted by salaried professional barristers. The power of the justice of the peace is limited to conducting preliminary proceedings for public trials and prosecution, without a jury, and gives summary trials. The justice of the peace grants to a defendant declared guilty the right to appeal to a county session. (b) The court of the county sessions. This is above the summary court, and there all the justices of the peace in the county

assemble four times a year to dispose of all the criminal cases as well as civil cases of a certain particular kind. Cases of a very serious or difficult nature are not handled there. (c) The assize courts on circuit of the high court of justice. The high court of justice handles cases involving death sentence and life imprisonment and grave civil cases. In London there is a high court of justice with a staff of twenty-five judges, which is divided into three sections, each handing different cases. One is the King's Bench, i. e. the criminal section of the high court of justice, which conducts circuit trials by sending out judges. Another is the Chancery Division i. e. the Lord Chancellor's Court. The other is a section relating to Probate, Divorce, and Admiralty Court. (d) The criminal court of appeal, which disposes of appeals from decisions given by inferior courts as mentioned in (a) and (b), when these decisions are at variance with fact or when they are due to mistakes on the part of the judge or judges, or from the submission of the defendant. (e) The high court of justice of the House of Lords, which constitutes the highest court in England, with the Chancellor and six high judges of the House of Lords, the latter being lawyers appointed to their posts as life peers. (f) The judicial committee of the privy council, which is composed of the President of the privy council, the Lord Chancellor or a privy councillor who has been a judge, and those who have been judges of high rank. It disposes

of final appeals relative to law suits in British overseas possessions and those relating to maritime affairs.

(2) *The civil courts of justice.* Trials of civil cases are more complicated than those of criminal ones. There are district courts for minor cases, but these are apportioned to five hundred circuits which are quite different from those of the circuit, courts, and in each of such circuits a district court is opened once every month. These circuits are again grouped into more than fifty larger circuits, each with one judge, who is responsible for ten smaller circuits on an average. Whereas in a criminal court the jury is necessarily in attendance, in a district court it is not always the case, only one judge deciding by law and fact. (a) A circuit court has jurisdiction over both civil and criminal cases. In handling the former, common law or equity serves as the basis on which to give decisions. (b) The Chancery, i. e. the Lord Chancellor's Court, a division of the King's Bench before mentioned, and that division relating to wills and other verifications, divorce, and maritime affairs, are both civil courts. (c) The chiefs of the three divisions of the high court of justice together with six standing judges and the President and five judges of the court of appeal, compose the court of appeal. (d) The court of appeal receives appeals originating in England and Wales regarding cases in equity, appeals from mistakes in laws, appeals of certain kinds from district courts,

and those relating to legal problems filed by the railways and canals committee. It also receives appeals from each division and other inferior courts.

(e) The Chancery together with the court of appeal is known as the high court of Parliament, but in fact the two do not combine into a distinct court, being a mere synthetic name covering the two. (f) With regard to civil cases, too, the highest court of law is the House of Lords, but in civil cases having a bearing upon the government, government officials take no part in their disposition.

In the United States, the law courts are classified into one supreme court, nine circuit courts, and eighty district courts, all these being provided for in the Federal constitution. Then there are the Court of Claims and the Court of Customs Appeals. In Columbia, Hawaii, Alaska, and the islands possessed by the United States there are also district courts under federal jurisdiction. (a) The supreme court of the United States. It owes its creation to the Judiciary Law of 1789. It is composed of a chief justice and eight associate justices. The chief justice acts as chairman during the sitting of the court, but has no power superior to that of the other justices, except that when it is necessary to make documents of the results of trials and decisions of the court, he sees to the assignment of the different branches of that business, or he appoints a preparation committee for the revision of such regulations and procedures relating to cases in common law and

equity as concern the supreme court. The justices are appointed by the President with the consent of the Senate to hold office during good behavior. Cases may be brought before the supreme court in any one of the three ways, viz. by original suit in accordance with the provisions of the constitution, by the removal of a case from a state court by the desire of the parties concerned, or by an appeal from a state court or a lower federal court. Appeals brought before the supreme court by state courts invariably concern controversies about federal rights. Appeals brought before the supreme court relate exclusively to the interpretation of the Federal constitution, the United States laws, and treaties, or to controversies about privileges claimed on the basis of the constitution.

(b) The circuit courts. The Judiciary Act of 1789 created a system of subordinate federal courts consisting of circuit and district courts. The circuit courts are nine in all the territory of the United States, each having under its jurisdiction three or more states. A circuit court consists ordinarily of wholetime justices, although justices of a district court may join them. The number of judges ranges between five and twenty-three according to the average number of cases handled. The hearings are conducted by two judges, and if the two do not concur, instructions or final decisions may be sought of the supreme court. A circuit court receives appeals and lightens the burden of the supreme court just like the Court of Appeal of Japan. Thus to

lighten the burden of the supreme court is to ensure the people's right to claim justice. With regard to appellate jurisdiction, the circuit courts have the right of final decision in most cases, civil and criminal, in which the amount does not exceed one thousand dollars and which concern controversies between citizens of different states involving no question of federal right, patent license, copyright, revenue, and admiralty and maritime jurisdiction. As has been said, the circuit courts lighten the burden of the supreme court by receiving appeals, and assume jurisdiction in appeals from district courts or sometimes force or reinvestigate certain kinds of orders issued by the inter-state trade committee or the federal trade committee. (c) The district courts. These are eighty in all under the circuit courts. Each state constitutes at least one district the larger or the more populous states having two districts or even four within their boundaries. Some districts embrace a part each of several states. Each district court has, as a rule, its own judge; but in a few cases there are two or even four proportionately to the number of cases handled. A district court handles cases regarded as federal crimes, cases in the Anti-Syndicate Law, suits relative to the Admiralty and Maritime Jurisdiction, suits relating to Home Production Taxation, the Postal Act, the Copyright Act, the Patent Act, the Bankruptcy Act, and the Rules of Trade Control, and also cases brought before federal courts prior to the decisions thereon.

in state courts. (d) Special courts created by Congress under authority granted by the constitution. Article III of the Federal constitution provides for three kinds of courts of law, viz. one supreme court, the circuit courts, and the district courts. Besides these there are special courts. Congress has (a) the power to estimate the amount of money to be paid for demands made of the United States, (b) the power to control commerce, (c) the power to enact rules and regulations necessary for the government of the territories and possessions, and (d) an absolute authority for Columbia; and these powers indeed gave rise to special courts. The first power produced, in 1855, the Court of Claims; the second power, in 1909, the Court of Customs Appeals; the third and fourth powers produced in Columbia the supreme court, the court, the court of appeals, the municipal court, the police court and the juvenile court and in the territories and island colonies other courts under the control of the Congress Act, thus ensuring the just exercise of the judicial power.

SECTION IV THE RIGHT OF COURTS TO EXAMINE LAWS

A court of justice is the machinery having in view the upholding of laws and regulations, and with regard to the exercise of the judicial power, it stands quite independently of all powers except that it acts in strict conformity to law. This fact gives rise to the responsibility of the judges to examine,

all laws and regulations issued by the different organs of the state. This is called the right of courts to examine laws. In the United States, where the extreme principle of the independence of powers is adopted, the courts examine the laws, not only with regard to their forms but also to their contents, and in case they should discover in a law anything recognizable as unconstitutional, they hold that law invalid. This power prevails not only under the Federal but also under state jurisdiction, and every Federal and state court can determine any law unconstitutional upon examination of its contents when dealing with a case brought in the form of a suit. To sum up, the courts have a power far superior to that of the legislators. This right of the courts to examine laws, especially that of the Federal judiciary is one of the outstanding features of the Federal constitution, established firmly at the time of the foundation of the Union. It is indeed attributable to the existence of this right of the courts that in the famous *Marbury v. Madison* case of 1803, the laws were declared unapplicable. The courts have the right and duty to declare a law invalid, not only when it conflicts with provisions of the constitution with reference to their literary interpretation, but also when it is unconstitutional with regard to the spirit of the independence of the powers and the equality of individuals. This may be said to be due to lack on the part of the people of confidence in Congress, and to doubt as to whether congress legislates justly.

without regard to party interests. In Germany, France, and certain other countries, however, where the supremacy of the legislative power is unconditionally recognized, the judges interpret the laws just as they are, and have not the freedom of declaring any of them unconstitutional. In England, where, the constitution is not distinguished from other laws, Parliament is at liberty to alter the constitution by enacting laws, and consequently there is no law that is unconstitutional.

In Japan, too, opinions differ on this question. According to some scholars, the laws are promulgated with the consent of the Gikai and with Imperial sanction; therefore the judges need not question whether or not they are just. Supposing they were sanctioned as laws without the consent of the Gikai, there is no reason why the judges should not act on them, and so they should not be held responsible for failure to examine them. If there is anyone at all who should be responsible, it must be the Minister in charge who countersigned them, and not the judges. From a practical point of view, such a problem is beyond imagination, but the only possibility that can be thought of is when the consent of the Gikai is not given lawfully and legally satisfactorily, as when something is wanting in the qualifications of the Members present or when there is not a sufficient quorum. Even in such cases, once a legal bill obtains Imperial sanction, it becomes valid as a law, so that the judges

cannot be held responsible for their application of the law. If there is anyone who should be responsible, it must be the Gikai itself.

If, however, in spite of the fact that the procedure of revision of the Constitution is more important than that of the enactment of a law, it is valid to apply an unconstitutional law, it would be tantamount to revising the Constitution and to ignoring the prescribed procedure for revision of the Constitution. Once, therefore, a law has been found to conflict with the Constitution, it is proper not to apply it.

SECTION V THE JURY SYSTEM

The jury system, which was promulgated in Japan by Law No. 50 in April of the 12th year of Taisho and was put in operation from October 1 in the 3rd year of Showa (1928), is even to-day, as at the time of its deliberation, a subject on which opinions differ as to whether it is recognizable under the provisions of the Constitution. The jury system of Japan, unlike that of other countries, operates within a narrow scope, the jury simply submitting to the court its opinion on fact, and having no part in the actual trial. Not only that, the court is under no restraint from its jury, and so whenever it considers the report of the jury not satisfactory, it has power to appoint another jury by the decision of the court, no matter what stage the case in hand happens to have reached. (The Jury Law, Article

XCV). Thus it may be seen that it is the court and not the jury, that submits a case to a jury, exercises laws, and gives recognition to fact. The jury system, therefore, cannot be said to conflict with Articles LVII^①, LVIII^②, and XXIV^③ of the Constitution.

The jury system is adopted also in countries of Europe and in America, but there is more or less difference between the systems of those countries with regard to the nature of cases calling for the verdict of a jury. In England and the United States, both civil and criminal cases require in principle the participation of a jury, although in minor civil cases, or by mutual agreement of the parties concerned, a jury's verdict may be dispensed with. In criminal cases, violations of the police regulations are the only exceptions.

SECTION VI THE COURT OF ADMINISTRATIVE LITIGATION

In Japan, the Court of Administrative Litigation is, as the name suggests, the machinery for handling cases instituted against administrative measures. By

① The judicature shall be exercised by the Courts of Law according to law, in the name of the Tenno. The organization of the Courts of Law shall be determined by law.

② The judges shall be appointed from among those, who possess proper qualifications according to law. No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment. Rules for disciplinary punishment shall be determined by law.

③ No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

administrative litigation is meant going to law for the recovery of rights infringed by illegal measures of the administrative authorities. The words *illegal measures* refer only to those taken exclusively by administrative authorities, those of other authorities being outside the scope of the meaning here intended. Further, the word *measures* must be taken in its precise meaning, laws and regulations issued by those authorities permitting of no litigation. The Court of Administrative Litigation adjudicates in such cases only as are brought before it according to law and Imperial Ordinances. It has not the judicial power in all administrative cases comprehensively. Article LXI of the Imperial Constitution provides : "No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law." This provision may suggest the idea that cases which do not come within the competency of this Court may yet be accepted by a court of law even when they originate in the illegal dealings of the administrative authorities. So long, however, as they are the results of administrative measures, they are, in essence, administrative cases, and therefore they must be handled by the Court of Administrative Litigation. In this connection, Article XVI of the present Law of Administrative Litigation may be cited, which runs :

"The Court of Administrative Litigation shall not take cognizance of claims for damages." This means that any suit which relates to claims for damages must be brought to a court of law even when it originates in administrative measures.

The Court of Administrative Litigation conducts joint trials attended by more than five, including judges and councillors. The judges, viz. the chief justice and councillors, are appointed from among those who have once held the posts of high administrators and justices. As to their appointment and dismissal, and the guarantee of their positions, similar provisions to those for judges are in force.

In England and the United States there is no court of this kind, and accordingly cases relating to illegal measures of the administrative authorities are accepted and adjudged by ordinary law in ordinary courts of law. In France the Conseil d'État^① functions in a way corresponding to the Court of

① The Council of State (Conseil d'État) occupies a very different position; no English or American court enjoys higher prestige. It plays a double rôle, having originally possessed only executive or advisory functions. In some measure the development of its jurisdiction as a court, the separation of its executive and judicial functions through the establishment of distinct committees, recalls the process by which the judicial committee of the privy council evolved as the highest court for the British Empire. Fortunately, adequate precautions have been taken to free the Council acting as a court from political influences and to give it a position of independence over against the government. The Council does include the political elements: the minister of justice, who, though nominally its president, makes only one formal appearance during his term of office; and twenty-one "councillors in special service" who, representing the various ministries, expound the official point of view, when the Council is asked for advice, and help to determine

Administrative Litigation. It must not be supposed that this is the only power granted to the Conseil

the nature of that advice as well. But these political members are excluded from the Council when it decides cases. Only the professional members, the thirty-five "councilors in ordinary service," act as judges. They are appointed by presidential decree, as the constitution requires; but half of them must have served for a considerable period in certain important positions connected with the Council, this preliminary service being open only to those who have demonstrated their fitness in competitive examinations. Such men bring to the Council of State a mature knowledge of the law and fine ideals of judicial conduct. The other half, though appointed without restriction of any kind, are men of proved capacity who have won reputation in the practice of law or in the higher ranges of government service. The personnel therefore includes two elements: one strictly professional and, by virtue of a long preliminary training, familiar with the procedure of the Council and with the jurisprudence which a mass of decisions has built up; the other drawn mainly from the active administration, acquainted with the practical aspect of questions which the Council has to decide, and less apt to be influenced by technical considerations. The mingling of these two elements has produced admirable results. The councilors, as Duguit says, "do not inspire in the governmental mind the distrust or jealousy which judges of the ordinary courts might inspire; and, on the other hand, they confront the government without that timidity which is not infrequently displayed by the ordinary judges." Nor has the government sought to impair this spirit of independence. No councilor has been arbitrarily removed since 1879. It might be observed that the salary of \$3200, which would be small indeed for such an august tribunal in England or the United States, is considered liberal in France; and a pension is granted upon retirement.

The advisory functions of the Council, though less important in practice than in theory, occupy a good deal of its time. Upon a large number of questions (having to do with public works, civil and military pensions, the creation of commerce courts, etc.) the ministers must seek its advice before taking final action. This happens in something like thirty thousand cases each year. Frequently, too, the statutes, which are enacted in general terms and applied by means of detailed ordinances, require the ministers to frame these ordinances on consultation with the Council. The latter discharges its duties conscientiously. But in any cases, and even where an opinion has been supported by elaborate explanations, the ministers are free to act as they choose. It is only in technical matters that they show a disposition to accept guidance. Naturally

d'Etat. It is composed of five divisions, four of which examine administrative affairs and the re-

enough this attitude grieves the Council, whose best efforts have been expended to no purpose; but on the other hand, the cabinet, under a parliamentary system, can hardly share serious responsibilities with a non-political body. It has been suggested that the ministers, unless excused in each case by Parliament, should be compelled to act upon the Council's recommendations. An alternative solution would be to leave the Council completely free for the conduct of its judicial business.

The Council of State as an administrative court, besides entertaining appeals from the Prefectoral Council, exercises original jurisdiction in three important classes of suits. In the first place it may annul administrative acts that are attacked as *ultra vires*, an act *ultra vires* being one which the official concerned was legally incompetent to perform, or which he performed without due observance of the settled procedure, or which involved the violation of some law. The complainant need not show that he has been injured by the act; it is sufficient that he has an interest, even an indirect moral interest, in its annulment. Thus an association of government officials may attack the appointment of an official if it seems to have been made in violation of the ministerial ordinance regulating such appointments. In the second place, the court may annul any act which, while legal in itself, has been performed for a purpose not contemplated by the law. Thus the court has held invalid a decree dissolving a municipal council because of irregularities in the election, for such a dissolution can legally take place only for the purpose of correcting abuses in the local administration; and when a prefect granted to a bus company the exclusive privilege of meeting trains at a railroad station, it was held that he had not acted, as he professed to have done, under the police power.

The Council of State has, however, no power to enforce its decisions. When damages have been awarded to an injured party or when the dismissal of a government employee has been declared *ultra vires*, the Council must rely upon the proper administrative authority to grant redress. Normally the decision will be accepted as a matter of course. But now and then officials show a disposition to resist the movement by which the Council of State is steadily extending its control over administrative acts.

Procedure before the Council of State is simple, expeditious, and inexpensive. The complaint may be filed at a cost of twelve cents. One of the officials attached to the court prepares a statement of the case, including the pleas of both parties to the suit, adds his own observations and passes the

maining one adjudicates in administrative acts. Judgments given in administrative litigation are the highest, in which respect France is quite different from England. In England, cases between individuals and those between individuals and the administrative authorities are indiscriminately embraced within the jurisdiction of the same court, while in France the judicature relating to administrative cases is thus made independent of the judicature proper. This is because judicial officials are not enabled to perform judicial functions satisfactorily with regard to administrative cases for fear of adverse criticism for infringement of administrative rights, whereas the

documents to a government commissioner for further scrutiny. Before the hearing takes place the councilors have acquainted themselves with all the details. They proceed rapidly to a decision, brushing aside technicalities which so often absorb the attention of lawyers and stand in the way of substantial justice. The Council of State has two judicial committees or *sections du contentieux*. One of these (composed of twelve councilors) deals only with cases relating to elections and direct taxes; the other (composed of nine councilors) has as much wider jurisdiction including such matters as highway offenses, damages occasioned by public works, pensions, dangerous or unhealthy establishments, etc. Both are divided into three subcommittees; but while in the case of the first *section* the subcommittees are competent to render decisions, in the case of the second *section* their work is altogether preparatory. The most important questions are reserved for hearing by the Council of State in "public assembly"—that is, by the whole body of councilors of state in ordinary service; and at the request of the government, or one member of a committee, or the vice-president of the Council any case may be withdrawn from the committees and decided in public assembly. The activity and zeal of the Council of State, as well as its business-like methods, are universally recognized. But unfortunately, with its existing organization and with the prodigious increase of litigation which social and economic reforms have entailed, the Council is quite unable to clear its docket. See E. M. Sait, *Government and Politics of France*, pp. 386-393.

Conseil d'Etat, although under the immediate control of the executive, is enabled to uphold the dignity of law perfectly in cases between individuals and the administrative authorities, it being vested with an exclusive power as the supreme court of administrative litigation.

From all that has been said it may be clear that the independence of the Court of Administrative Litigation from the judiciary courts originates in the idea that administrative cases may better and more properly be entrusted to a court specializing in that line than to judiciary courts.

Note :

By "the Court of Administrative Litigation" is to be understood a tribunal where cases instituted against administrative measures are adjudicated. The law provides certain limits upon rights of subjects to insure the safety of the same. And no part of the body politic can claim any exemption from the duty of observing these legal limits. Therefore, when an administrative office in carrying out official measures, infringes the rights of subjects by violating the law or by overstepping the bounds of its functionary powers, such office has to submit to the decision pronounced by the Court of Administrative Litigation. How is it that, while it is the function of the courts of justice to try cases of law, a Court of Administrative Litigation is to be especially established? The proper function of judicial courts is to adjudicate in civil cases, and they have no power to annul measures ordered to be carried out by administrative authorities, who have been charged with their duties by the Constitution and the law. For, the independence of the administrative of the judicature is just as necessary as that of the judicature itself. Were administrative measures placed under the control of the judicature, and were courts of justice charged with the duty of deciding whether a particular ad-

ministrative measure was or was not proper, administrative authorities would be in a state of subordination to judicial functionaries. The consequence would be that the administrative would be deprived of freedom of action in securing benefits to society and happiness to the people. Administrative authorities carry out measures by virtue of their official functions, and for these measures they lie under constitutional responsibility, and it follows that they ought to possess power to remove obstacles in the path of these measures, and to decide upon suits springing from the carrying out of them. For, should the administrative be denied this power, its executive efficacy would be entirely paralyzed, and it would no longer be able to discharge the responsibilities put upon it by the Constitution. This is the first reason why it is necessary to establish a Court of Administrative Litigation in addition to judicial courts. As the object of an administrative measure is to maintain public interests, it will become necessary under certain circumstances to sacrifice individuals for the sake of the public benefit. But the question of administrative expediency is just what judicial authorities are ordinarily apt not to be conversant with. It would, therefore, be rather dangerous to confide to them the power of deciding such questions. Administrative cases ought, accordingly, to be left to the decision of men well versed in administrative affairs. This is a second and final reason why the establishment of a Court of Administrative Litigation is necessary, in addition to judicial courts. But its organization, like that of the latter, must be established by law. By Notification No. 46 of the Department of Justice of the 5th year of Meiji (1872) it was provided that all suits against local officials should be instituted in a court of law. This led to the accumulation in the courts of actions against local officials, and there were manifestations of a tendency, on the part of judicial authorities, to exert their influence with the administrative. By Notification No. 24 of the 7th year (1874), the expression "administrative litigation" was first made use of. According to that notification, when any one brought a suit against a local official, the judicial authority taking cognizance, had to

bring the matter to the notice of the Council of State, with a statement of the circumstances. But this system was meant simply as a temporary means of remedying the evil tendency then manifesting itself, and the establishment of the Court of Administrative Litigation was left to the work of the future. By the expression "illegal measures of the administrative authorities," it must be understood that no suit can be brought against those measures that have been carried out in conformity with law or with the functionary power of the office in question. No one, for example, shall be allowed to institute a suit touching a measure, which is in conformity with a law, placing restriction upon the right of property for the sake of the public good. The expression "rights alleged to have been infringed" points to the evident conclusion that mere damage to one's interest, though it can become the ground of a petition, begets no right of bringing an administrative litigation. When, for example, administrative authorities shall have fixed the course of a line of railroad, according to an established process, the local inhabitants may remonstrate, thinking that it would be more advantageous for them to have its course fixed in some other direction. Such a remonstrance would relate to interest and not to right. So the inhabitants may petition the competent authorities, but will not be allowed to bring an action before the Court of Administrative Litigation.^①

^① H. Ito, *Commentaries on the Constitution of the Empire of Japan*, pp. 108-112.

PART VI
THE FUNCTIONS OF GOVERNMENT
CHAPTER XX
LAWS

SECTION I THE PRINCIPLES OF LAW-MAKING

CCORDING to the Japanese Constitution, "The Tenno exercises the legislative power with the consent of the Teikoku Gikai."^① This is but to clarify the principles of law-making. The law-making power mentioned here refers to law-making in its essential sense. It establishes the necessity for all law-making to obtain the decision of the Gikai except in cases where recognition is given to other expediencies, whereas the common opinion in Japan does not admit this principle, interpreting the term *law-making power* in its formal sense. To be concrete, the term *law-making power* is interpreted as the power to enact laws, and not as the power to make the provisions of laws. In other words, the manifestation of the state will under the name of laws is taken to be what the Tenno wills with the consent of the Gikai. The fact, however, that law-making in its essential sense is one of the foundational elements of the constitutional system, is well illustrated in the old Prussian constitution (Art.

^① The Constitution, Art. V.

LXII) and the constitution of Belgium (Art. XXVI), both of which provide that the law-making power shall be exercised collectively by the king, the House of Representatives, and the Senate. This clearly shows that the term is accepted in its essential sense, and all scholars are unanimous in admitting that the provision of Article V of the Japanese Constitution originates in the constitutions above referred to. If the common opinion were accepted, Article V would be a duplication of Article XXXVII of the Constitution, which runs: "Every law requires the consent of the Teikoku Gikai." Not only that, it would inevitably restrict the consent of the Gikai to such matters only as are provided for in the Constitution as requiring special prescription by law. As it is, such matters are mere fragmentary provisions, and cannot be taken to comprise any and everything that requires the consent of the Gikai.

In short, Article V of the Constitution, in the same way as Article LVII, establishes the principle of the "séparation des pouvoirs" i.e. "a strict line of demarcation between Legislature, Judicature, and Executive."^① Just as the judicial power provided for

^① The general American doctrine is of the separation of delegated powers, and is commonly set forth in State constitutions. Such separation of powers is not expressly declared in the constitution of the United States; the principle here is of limitation no further than is necessary for the protection each department of government. Fundamentally it is a question of functions. Whatsoever authority is necessary and proper for a department of government to exercise, belongs to that department. The separation of powers,—legislative, executive, judicial,—is a matter of agreement or convention made by the sovereign.

in the latter must be interpreted in its essential sense, just so must the law-making power in the former be interpreted. There are, however, some exceptions in the practical application of this principle, there being provisions for making laws without the consent of the Gikai with regard to certain specified matters and on certain special cases. It sometimes happens also that the law-making power is delegated by law to some other organ than the Gikai. Some of the most important instances of law-making thus effected without the consent of the Gikai are the Imperial House Law, emergency Ordinances, executive orders, independent orders, delegated orders, treaties, etc.

The term *law* is usually used in its formal sense and is distinguished from such regulations as are mentioned above. The word *regulations* means not only laws but orders, treaties, etc. and the word *law* means law in its formal sense.

SECTION II FORMALITIES FOR LAW-MAKING

(1) *Introduction of law bills.* Every law comes into being by the sanction of the Tenno following the consent of the Gikai. Deciding on a law bill and presenting it to the Gikai for deliberation is called introduction. The right of introducing a law bill in the Gikai belongs to the government and both Houses of the Gikai. When the government wants to introduce a bill, it is first drafted in the department of the government concerned and submitted to the Legislation Bureau for investigation. Then it is submitted

to a Cabinet council for deliberation, and with Imperial sanction following the approval of the Cabinet, it is introduced in one of the Houses by the Prime Minister or else by the Prime Minister and the Minister in charge. It is left to the choice of the government to which branch of the Gikai to present it. In practice, however, finance bills are usually presented to the House of Representatives. Every bill to be presented by either of the Houses in the other must have passed the House of origin. It is presented at the instance of a Member of the House of origin with the support of the fixed number, i.e. more than twenty, of Members of the House. The words *at the instance of* must not be confounded with what is termed the *introduction* of a bill. The former is simply to propose the introduction of the bill. Any bill, rejected in either of the Houses, cannot be introduced again during the same session. The Law of the Houses prescribes nothing for possible cases in which the same law bill is presented in both Houses simultaneously, but the regulations of each House provide that a bill once presented to either of the Houses cannot be presented to the other and be placed on the order of the day. Every bill presented by the government, unlike one presented by either of the Houses, receives special treatment legally with reference to the following points. (a) It is placed on the order of the day in preference to other bills. Any other bill can be taken up for deliberation only with the consent of the government in case of urgent

need. (b) No decision can be made on a government bill without deliberation by the committee except when so demanded by the government. As to a bill introduced by a Member, it is left to the choice of the House concerned whether or not to submit it first to the committee, but as to a bill introduced by the other House, it must at all events be submitted to the committee just as in the case of a government bill, in accordance with the regulations of both Houses. (c) The government may at any time amend or withdraw a bill which it has introduced.

In England, law bills are, as has been stated before, divided into public, money, and individual bills, of which the most representative ones, i.e. public bills will be discussed later with special reference to the formalities for their enactment, leaving money bills till we come to the budget. The right to propose a law bill formerly belonged to the King, but it is now in the hands of member-officials in the government. A bill introduced by a member official is, as in Japan, regarded as of greater importance than one sponsored by an ordinary member. A law bill is introduced in one of the following three ways. (a) A bill may be introduced by a member by placing it on the desk of the House secretary. It is then regarded as having passed its first reading. (b) First of all a motion is made by a member for obtaining permission to introduce a bill, without previous notice, and when concurrence is unobtainable, a ten minutes' discussion is held to decide on the motion. This

carried, the bill is formally introduced. (c) The proper method is to notify the House beforehand of the intention to introduce a bill, and when the order of the day is entered into, a motion is made to obtain permission to introduce it. When the motion is adopted, then it is introduced in due form. In the United States, every bill is introduced, not by the government, but by a Representative or a Senator. Accordingly, the President of the United States, even if he desires to make a new law out of administrative necessity has no power to do so. The necessary alternative for him is to make a Representative or a Senator from his own party introduce the desired bill. A noteworthy fact in this connection is the existence of what is called a party primary meeting. The object of this primary meeting is to promote coöperation among the members of the party, but one of its functions is to draft provisions of important bills. Any bill can be introduced in either of the Houses except one on revenue increase, which must be introduced in the House of Representatives. A bill thus introduced undergoes thorough investigation at the hands of one or another committee according to its nature, and then it is submitted for deliberation in a plenary session. Sometimes a subcommittee is appointed to determine the form of the bill thus to be introduced.

(2) *Adoption of a bill.* By this is meant deciding on a bill by giving approval to it by both Houses of the Gikai. As has already been stated, here in

Japan as in most other countries, every law bill must pass its three readings before its adoption.

(3) *Sanction and promulgation of a law.* In Japan, the introduction and passage of a law bill is the preliminary legislative act, and the legislative act proper is nothing other than its sanction. A law bill adopted by both Houses of the Gikai is established as a law by Imperial sanction. Imperial sanction may therefore be said to endorse the fact that the law bill has received the legitimate approval of the Teikoku Gikai. Imperial sanction depends upon the absolute will of the Tenno. Even a government bill which has passed the Gikai without any amendment, may not be sanctioned by the Tenno. Since the promulgation of the Japanese Constitution, however, no law bill which has passed the Gikai has ever failed to obtain Imperial sanction. In England, the supreme power of the king is constantly interfered with by Parliament, and royal sanction is a matter of mere form. It means that refusal of sanction is regarded as an unconstitutional act on the part of the king. In democratic countries, as has been said, presidential approval of a law bill does not constitute the essential condition in legislation. Article XXXII of the Law of the Houses of Japan provides that every bill approved by both Houses and granted Imperial sanction shall be promulgated by the beginning of the next session of the Gikai. It therefore follows that a bill not promulgated by the next session, may justly be regarded as having failed to obtain Imperial sanc-

tion. However, this provision must not be taken as fixing the time limit for Imperial sanction.

The Tenno orders the promulgation of laws. Thus promulgation is the necessary result of Imperial sanction. A law, which is established by Imperial sanction, must be announced. This announcement is the promulgation, which sets a law practically in motion. It rests with the sovereign power of the Tenno to order the promulgation of a law, but a law once sanctioned, needs promulgation. The Tenno has no choice between promulgation and non-promulgation. Promulgation is made through the Official Gazette. The law thus promulgated is just and those who apply laws should recognize it as the authentic text of the law. They need not question whether or not it is different from the original text of the law sanctioned by the Tenno. It goes without saying that in case there should be any typographical errors in the Official Gazette, those in charge of the promulgation should take it upon themselves to correct them.

When a law is promulgated, the text is usually preceded by an Imperial Edict declaring the fact of its being a law. Such an Edict is usually worded thus: "We (the Tenno) hereby give Our sanction to the following law bill that has passed the Teikoku Gikai and cause it to be promulgated." The Imperial Edict preceding a law bill that has passed the Privy Council contains, in addition, words testifying to that effect. Every law thus promulgated is also

accompanied by the statement that it be put in force after the elapse of full twenty days including the day of promulgation. However, it is permissible that different laws become effective in different numbers of days after promulgation, and thus there is some latitude within the twenty days. To provide thus a fixed period of grace for the enforcement of every law is simply to let the people know of the enactment of a new law and make them acquainted with the details thereof. Consequently, after the lapse of a period of grace the people are inevitably considered as being acquainted with the existence of that law. They are not allowed to refuse subjection to it under the excuse of ignorance.

SECTION III THE EFFECT OF A LAW

(1) *The contents of a law.* In discussing the effect of a law, it is important first to ascertain what details it contains. It is indeed possible to provide for any and everything by means of law, but there is a limit, calling for a special consideration of the following points. (a) A law must not contain any provision against the Constitution, but, in fact, an unconstitutional law is possible, since there is no machinery to examine the details of such a law and stamp it as invalid. (b) With respect to matters relating to the Imperial Family, the Imperial House Law and the Imperial Family Law are both stronger in force than all other laws, and therefore any law conflicting with these laws is invalid. (c) The machi-

nery of the House of Peers is established by the Ordinance on the House of Peers and cannot be provided for by law. (d) No laws can conflict with International Law and the existing treaties. In case a law should be made in contradiction to them, it would constitute an infringement of duty in the light of International Law. However it would be valid until it should be abolished.

(2) *The formal effect of a law.* No law can ever be altered or abolished by any state rule in a form other than that which a law ought to assume. A law can be altered or abolished only by law or by the provisions of a law. The formal effect of a law has nothing to do with its contents. So long as a law is a law, its formal effect is free from any influence whatever by any scholarly interpretation or any administrative effect of it. Nor is it affected by the possible fact that it is a set of regulations applicable to a particular matter. Thus the formal effect of a law is always the same and cannot be changed by any order or by any other expression of intention. With regard to matters relating to the Imperial Family, the Imperial House Law and the Imperial Family Law are stronger in force than the other laws, and only within the bounds of these laws is alteration of laws possible. A treaty may sometimes be the cause of the subsequent alteration of a law since the former has the same effect as national law. No ordinary orders can put an end to the effect of a law, but an emergency Ordinance alone can suspend

it temporarily. The formal effect of a law appears with the passing of that law and does not wait for the day when it becomes effective. Indeed, a law develops its formal effect immediately upon its adoption by the Gikai and by Imperial sanction.

CHAPTER XXI

ORDERS

SECTION I THE MEANING OF ORDERS

RDERS^①, like laws, usually proclaim regulations, but sometimes they do not. An order which enacts a statute is called a regulating order, under which heading falls an emergency Ordinance, an executive order, and a police order. An order which provides for matters outside the rights and duties of the state and the people, or which makes provisions for the exercise of the already existing rights under a statute, or which makes provisions binding upon men only on condition that they obey them at their own discretion, or which provides standard rules on the administrative functions of the state but which does not make up a statute, is called an administrative ordinance.

An Ordinance issued by the Tenno is called an Imperial Ordinance. A statute enacted by an Imperial Ordinance may either be an emergency Ordinance,

① Orders which proclaim regulations are called by German scholars regulating orders, and those which do not, administrative ordinances. Administrative ordinances, unlike regulating orders, have no comprehensive power of control over the rights and duties of the people, but they only concern the internal organization and functions of the administration, as do the Public Service Regulations, regulations for the conduct of official business, regulations for official establishments, etc.

an independent order, a delegated order, or an executive order. An order issued by the administrative authorities may be either an official order or a delegated order. The former is an order issued with powers widely delegated by virtue of the official organization, and is issued within the provisions of Article IX of the Constitution. The latter is an order issued with special reference to certain matters in conformity to the laws, or to Imperial Ordinances, or to orders from higher authorities. Local self-governing bodies can issue laws concerning the rights and duties of the people, within the limits of the autonomous right granted by law. The executive of England possesses both legislative and judicial powers. To be precise, it issues (a) royal ordinances and charters to the overseas possessions with the advice of the privy council, (b) royal ordinances and decrees to control currency in the overseas possessions with the advice of the privy council, and (c) royal ordinances concerning appeals to the King in the privy council by the overseas possessions and protectorates. The executive can also provide for the supreme command of the army and navy and for the control of civil officials by royal ordinance through the medium of the privy council, can control the foreign trade by royal ordinance in war times, and can prohibit emigration by decree.^① The

^① A tentative order must be distinguished from the kinds of orders. This system, which originated about the middle of the last century, has been in wide operation ever since, and is resorted to with regard to any bill the government lays

executive of France is also vested with the power to issue orders for the enforcement of laws, and thus can remedy defects in laws. As in all other constitutional countries the National Assembly of France suffers from a heavy burden of legislative functions, and so delegates part of it to the executive. The legislature makes no provisions for enforcing laws, as in England and the United States, but in most cases simply prescribes that "general executive orders shall provide proper means to secure the enforcement of this law." Further, the National Assembly has entrusted the executive with the power to issue general executive orders on certain special matters not yet provided for by law. To cite two instances: The executive was entrusted with stipulations for the duties of judges and their qualifi-

before Parliament as a special or government bill. Such temporary legislation is generally applied to bills of a local nature, but nowadays most of the executive departments are able to issue such orders on the basis of the Parliament Act. When a tentative order is made a bill and is approved by Parliament, it becomes a statute. The maintenance of piers and harbours and the readjustment of railways and public land are typical matters disposed of by tentative orders. Tentative orders become valid on the day when they are confirmed, but they are not always put into operation, it seems. The meeting for the confirmation of orders held in 1922 by the County Council of Lanarkshire confirmed the tentative orders on bills passed on March 29, 1922, and recognized them effective on and after the day of the meeting, unless there was any other regulation. The legislative power in the provinces of Scotland is exercised by means of tentative orders, thus obviating special bills. This method of delegating functions is mainly local in nature, but in such a country as England, where troublesome formalities for law-making must be gone through, it will gradually become universal.

cations for promotion by the Finance Act of 1906, and with the determination of necessary means to prevent epidemics by the Law of Public Sanitation of 1902. These executive orders are issued for form's sake by the President, of course, but, in fact, they come from the cabinet and the different departments of state, which are practically the legislative centres of the executive.

SECTION II EMERGENCY ORDINANCES

Emergency Ordinances are Imperial Ordinances issued by the Tenno while the Gikai is closed to serve as substitutes for some specially urgent laws which would otherwise be duly made. They are of two kinds, one as substitutes for laws according to Article VIII of the Constitution and the other for the disposition of affairs of financial necessity according to Article LXX of the Constitution. These latter are not substitutes for laws. They are Imperial Ordinances from the Tenno to dispose of financial affairs without the consent of the Gikai, which it would ordinarily be necessary to obtain. An emergency Ordinance is a special institution and its issuance is subject to the following conditions. (a) That it be while the Gikai is closed. This means that it must be during the time when the Gikai is not in session. It does not necessarily mean that it should be during the time when the Gikai cannot be convoked. (b) That it is necessary for maintaining the public peace or for averting public calamities.

An emergency Ordinance is an expediency for dealing with a national or a social emergency. It can be issued only to maintain the public peace or to avert public calamities. It cannot be issued for promoting the public welfare along positive lines. (c) That there should be the need of making a new law. An emergency Ordinance cannot be issued when the usual administrative authorities suffice to attain the object within the bounds of the existing laws; for it is issued only when a new law is needed. (d) That it be urgently needed. The words *urgently needed* mean that necessity allows no delay, as when it is impossible to wait for the next session of the Gikai or when there is no time to convoke an extraordinary session.

When an emergency Ordinance has been issued, it must be laid before the Teikoku Gikai at its next session to obtain the consent of the two Houses. If, in that case, the Gikai does not approve it, the government must declare the Ordinance invalid for the future. The consent of the Gikai is sought for partly in order to get the issuance of the order justified and partly in order that the Ministers of State may be relieved of their responsibility.

The emergency Ordinance thus issued is practically a law and is valid as such. Two logical developments are (a) that it can not only abolish or alter laws but also even abolish or suspend or alter other emergency Ordinances issued previously, and (b) that it can neither be abolished nor altered by

the state will, which cannot abolish or alter laws, the only way left, if need be, being recourse to the Imperial Constitution, or laws or another emergency Ordinance.

In England, too, the Bill of Rights of 1689 provides that the king is not able to suspend the existing laws by emergency ordinances. Accordingly, when it is considered for the good of the state and the people and so is practically unavoidable to suspend an existing law as in case of an emergency, it is, in form, illegal, and is not permissible under the constitution. The government is able to take such a step only at its own risk, subsequently laying the matter before Parliament as soon as it sits and asking for exoneration from its responsibility for such illegality.

In Japan, however, issuance of an emergency Ordinance is a legal act recognized by the Constitution, and there is no room for doubt as to its propriety, as is evidenced by Article VIII of the Japanese Constitution, which reads: "The Tenno, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Teikoku Gikai is not sitting, Imperial Ordinances in the place of law. Such Imperial Ordinances are to be laid before the Teikoku Gikai at its next session, and when the Gikai does not approve the said Ordinances, the Government shall declare them to be invalid for the future." Thus it cannot be taken for granted that emergency Ordin-

nances as mentioned before, cannot be issued to provide for legislative matters with no regard for the provisions of the Constitution, except when abolishing or altering laws. In short, Imperial Ordinances referred to in Article VIII can serve just the same purposes as ordinary laws.

SECTION III INDEPENDENT ORDERS

Independent orders are orders issued with a view to maintaining public peace and order and thus contributing to the welfare of the people. They are issued neither in order to enforce laws nor on account of delegation by law. They stand quite independent of laws, being issued by the supreme power of the Tenno. They can, however, be issued only with regard to provisions of the Constitution, since they are exceptions to the principle of legislation by means of the Gikai, whereas there is no restriction to the scope of provision by law. Important independent orders are the Ordinance on State Formalities, Police Orders, the Ordinance on Official Organization and Officials, the Ordinance on the System of the Army and Navy, the Ordinance on Honours, the Ordinance on Amnesties, and the Ordinance on the House of Peers. (a) The Ordinance on State Formalities. This Ordinance stipulates the method whereby proclamation is made of the expression of the intention of the state, as in the case of the Japanese Constitution, the Imperial House Law, and laws. (b) Police Orders. This is some-

times called an independent order or an independent regulating order or simply a supplementary order. The common view is that by means of this kind of order anything and everything can be regulated, the only constitutional restrictions being that they must concern only such affairs as are expressly required by the Constitution to need provision by law, and that they cannot be altered by law. This view is a mistake. Originally these orders are products of quasi-legislation as against regular legislation effected by the Gikai, which fact naturally indicates that there must be a certain limit to the scope of that kind of legislation. The limit mentioned refers to the case where it is necessary "for the maintenance of public peace and order, and for the promotion of the welfare of the subjects." The words *maintenance of public peace and order* mean "prevention and removal of obstacles to social well-being along negative lines," while the words *promotion of the welfare of the subjects* mean "increase of the happiness of the people at large along positive lines." The one, issued with the former object, is a police order, and the other, with the latter object, an administrative Ordinance. If an order has the two objects combined, it may be called an administrative as well as a police order.

A Police Order aims at the maintenance of social order, and so, needless to say, it cannot be issued for the maintenance of order conceivable in terms of private law. An administrative Ordinance, which

has in view the promotion of the welfare of the subjects, cannot be such as will impose duties upon the subjects. The words *promotion of the welfare* mean, not "imposition of duties," but "supply of good." To be concrete, an administrative ordinance determines the conditions under which the people can make use of such material accommodations and enterprises as are necessary to maintain and manage for the promotion of social well being and the public good. (c) The Ordinance on Official Organization and Officials. "The Tenno determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same." By official organization is meant the determination of the constituent parts of the different branches of the administration entrusted with state affairs by and under the Tenno, and of the powers due to those parts. Such determination is made by an Imperial Ordinance according to Article X of the Constitution, except the organization and the powers of the Court of Administrative Litigation and the Board of Audit, which are determined by law according to Article LXI and LXXII, Section II of the Constitution. The grades, salaries and other allowances, standing, discipline and regulations for the services of officials are, in principle, to be determined also by Imperial Ordinances.

Between officials and the state there exists a legal relation based upon mutual consent, since the former attend to their duties for the latter out

of their willingness to do so. Consequently, there would be no need of a law or an Imperial Ordinance specially to determine the functions of officials, except for the necessity of maintaining order among officials and confirming their rights and duties. The regulations relative to the qualifications for official appointments, too, are not regulations in character, but are simply an administrative order, except in the case of judges and court officials, whose appointment is prescribed by law and by the Imperial House Law respectively. (d) The Ordinance on the System of the Army and Navy. The power to determine the organization of the army and navy, unlike the supreme power of command, requires the assistance of the Ministers of State, as is the case with the supreme power to deal with state affairs. Originally, details regarding the first power must, like the organization of the different branches of the administration, be determined by an Imperial Ordinance, but the usual practice is to regard it in the same light as the supreme power of command, a military order thus determining the organization of the army and navy. (e) The Ordinance on Honours. Business relating to ranks and titles belongs to the Imperial Household Department, and that relating to other marks of honour to the Cabinet. Accordingly, the ranks and titles are prescribed by the Imperial House Law, and all other marks of honour by an Imperial Ordinance. (f) The Ordinance on Amnesties. By an amnesty is meant the act of surrendering a part

or the whole of the state authority of punishment to a criminal without recourse to legal proceedings. A stay of execution, probation, parole, and postponement of prosecution are each also a surrender of this authority, but they are acts performed by the judicial organs in accordance with the provisions of the Code of Penal Procedure. The power to grant amnesties, on the contrary, is the surrender of the same by the supreme power of administration. The primary object of amnesty is the alleviation of the uniformity principle natural to law, tempered with the spirit of fairness. According to Article XVI of the Constitution, the Tenno possesses the supreme power to grant general amnesty, pardon, commutation of punishments, and rehabilitation. By this it is clear that regulations relative to amnesty are determined by an Imperial Ordinance. Formerly amnesty was provided for in the Code of Penal Procedure and the Penal Code, but later, by the revision of these two, the provisions relative to amnesty were struck out, and replaced by rules of amnesty in the form of an Imperial Ordinance. (g) Besides those enumerated, there is the Ordinance on the House of Peers. According to the Constitution, these lie within the scope of independent legislation by Imperial Ordinances, but usage permits two exceptions,—education and the calendar system.

The convocation, opening, prorogation, and closing of the Gikai and the dissolution of the House of Representatives are ordered by the Tenno, but these

acts must be in perfect accord with the provisions of the Law of the Houses so that there can be no general legislation in the form of an Imperial Ordinance. This is also the case with the conditions and effects of a state of siege, which are usually determined by law, an Imperial Ordinance simply making the proclamation thereof when occasion requires, according to the provisions of law. The extension of a session of the Gikai and the determination of the period of an extraordinary session of the same are proclaimed by the Tenno, but these are simply administrative acts, and do not require legislation in any sense.

SECTION IV DELEGATED ORDERS

A delegated order is an order based upon delegation by law, which means that in providing for any particular matter, the law concedes the function to the order, itself having nothing to do with the determination of details. The order issued in this way takes the form of an Imperial Ordinance or a Cabinet, a departmental, or a prefectoral ordinance. Some scholars, who hold that the sovereign authority of the Tenno is in the hands of the Tenno himself and cannot be delegated to others, hold also that the legislative power, too, admits of no delegation and deny the existence of anything like a delegated order. However, there is no justification in the assumption that no power confirmed in the Constitution can in any way be delegated to others, nor as a matter of

legal sentiment is there room for any doubt about such a possibility. The fact of the matter is that when a law commits a particular matter to an order, the consequent regulations in the form of the order may at once be taken as regulation by law. In other words, what an order provides for may rightly be called what law provides for. A delegated order does not become ineffective with the abolition of the law which first delegated it. That is because an order, once promulgated on authority delegated to it by law, is a separate existence distinct from the law and loses the original relationship to the latter. As to whether or not a delegated order can be re-delegated to still another order, there are no provisions of law recognizing such re-delegation, but it may properly be said that in some cases it can be and in some cases it cannot be, according as there is or is not any explicit prohibition from this step, dependent upon the object of the original law and upon the nature of the matter to be provided for in the order. In England, similar to the auxiliary legislative function is delegated legislation, by which the executive is vested with the power to issue royal ordinances within the limits of the national law for the execution of international agreements, and this because there is a marked increase in the extent to which laws are affected by international agreements. Two instances are Article XXIX of the Copyright Act of 1911 and the Air Act of 1920. The former provides that royal ordinances may be issued to

apply the first part of the said law to any book published for the first time in a foreign country or to its author when he is a foreign citizen, while the latter that royal ordinances may be issued to carry out the said agreement in accordance with the agreement on aerial navigation, and to make it powerful. These are generally called delegated orders. A delegated order is usually issued when the legislature, upon the passage of a law bill drafted by it, wants to find ways and means of administering it more effectively than otherwise. In short, such a system is based on the idea that the enactment of laws is the right of the subject of rights—Parliament—and that other rights may properly be delegated to other organs.^① These orders are a product of the Mediæval idea of Europe that Parliament is a subject of rights pitted against the king, or that the legislative power is the highest power and nothing is impossible to law. Therefore, to those who are strangers to this thought, these ordinances must seem to be a violation of the constitution.

SECTION V EXECUTIVE ORDERS

By executive orders are meant orders pro-

^① In England, an order is sometimes issued to fix the time for a law to become effective, or to suspend the operation of a law or a part of it, as in the case of Article I of the Animals Import Act of 1922. These are instances of delegated orders. Another instance is to be found in the delegated order permitting the application, in case of need, to the Isle of Man of the law relative to warfare passed according to the Isle of Man Act of 1914. For the history of the Isle of Man. See Burge's *Colonial Law*, Vol. I, pp. 128.

mulgated in order to carry out laws. Article IX of the Constitution provides in this connection thus: "The Tenno issues or causes to be issued, the Ordinances necessary for the carrying out of the laws." Such Ordinances are usually issued under the name of "the orders for carrying out the law of . . ." or "the regulations for carrying out the law of . . ."

An executive order is subordinate to a particular law for which it is issued, and it provides for details necessary for the practical carrying out of the law within the scope determined by it. Consequently it cannot provide for anything which is against the principles or bounds of the law; otherwise it would not take effect. It may be added, however, that it is not a mere instruction directed to the government offices. Far from it, it is a set of regulations just the same as a law with a binding force upon the state and the people, since it provides for particulars within the scope of the law concerned. The Order for the Election of Representatives, the Order for the Carrying Out of the Conscription Law, and the Order for Carrying Out the "Fu" and "Ken" System are all executive orders.

CHAPTER XXII

TREATIES



TREATY is a formally signed contract between states. A treaty may sometimes include provisions pertaining to domestic law, in which case each contracting party is under obligation to observe the treaty as it affects the other party or parties, and at the same time the treaty itself bears the character of a domestic law within the territory of each party.

(1) *The conclusion of a treaty and its promulgation.* A treaty is concluded usually by a three-fold process, viz. (a) diplomatic negotiation, (b) signing by plenipotentiaries, and (c) ratification. The supreme power to conclude a treaty is vested in the Tenno, and therefore the Teikoku Gikai cannot take part in that act. The Tenno orders His plenipotentiary to conduct negotiations and put his signature on the treaty, and then ratifies it.

Thus a treaty comes into effect by the ratification of the Tenno, but in certain cases the signing of the plenipotentiary suffices. The ratification of a treaty is the act by which it becomes the will of the state. It consists of writing a postscript at the end of the text of the treaty declaring its ratification, affixing the Imperial signature and the Great Seal, and writing the date and countersigning by the

Foreign Minister. Ratification is merely a decision of the state will, and as such it must be given due expression. Such expression takes a double form, one side being the expression of the state will to the other party or parties by an exchange of notes of ratification upon the contract entered into, and the other being the expression of the same to the people by means of promulgation of the treaty as being of the nature of a domestic law. The promulgation of the treaty is made of a treaty accompanied by an Imperial Edict stating that it has duly passed the Privy Council and bearing the Imperial Signature and the Great Seal, the Prime Minister writing in the date, and countersigning in order with the Minister in charge. The Imperial Edict is usually worded thus: "We, after referring to the Privy Council, hereby ratify the... Treaty with...and cause it to be promulgated." When a treaty is to be concluded merely by the signing of the plenipotentiaries, it becomes effective with an exchange of signed notes. In this case promulgation is made of it with Imperial sanction as far as the people are concerned. However, Imperial sanction in this case, unlike the ratification of a treaty or the Imperial sanction of a law, is not the act of newly determining the state will, but it is a simple act of giving to the already existing state will the form of an Imperial Edict as far as the people are concerned. The Imperial Edict in this case is usually worded thus: "We, after referring to the

Privy Council, give Our sanction to the... Treaty with.... and cause it to be promulgated.”^①

(2) *The effect of a treaty.* A treaty is concluded by the sovereign power of the Tenno, and so it cannot alter the Imperial Family Law, not to speak of the Constitution. With regard to its formal effects as a domestic law, however, it is proper to consider it to be on the same plane with a law, and therefore it may rightly be assumed that it can alter any of the already existing laws. The contents of a treaty are at once the provisions of a domestic law, particularly in the following four cases, viz. (a) Treaties of commerce and navigation, a customs treaty, an international copyright treaty, an international technological ownership treaty; (b) Treaties regarding marine communications, salvage, commercial bills, and weights and measures; (c) Treaties regarding territorial changes and boundary lines; and (d) Treaties aimed at the attainment of specified objects by co-operation with other countries with regard to the postal, telegraphic, wireless, and railway services. It may be mentioned that opinions are divided as to whether these treaties are by themselves effective as domestic laws, or whether for such

^① It may be added that Article XVIII of the League of Nations Covenant provides that all treaties concluded in future between member countries must be registered with the League of Nations Office and that until such registration is finished they will not be binding on the parties concerned. However, the registration in this case is effective only within the scope of international law, having no bearing upon the effects of such treaties in their relation to domestic laws.

purposes it is necessary to promulgate other special laws incorporating the same details.

Some argue that a treaty does not become effective by itself as a domestic law and that for this purpose it is necessary to enact a special law, the Gikai in this case being under obligation to give its approval to that law bill. It must be pointed out, however, (a) that the Gikai is under no such obligation except when it is bound by the right of approval or other restrictions and (b) that, if the Gikai were under such obligation, the result would be restraint imposed upon the Gikai by treaties. Others argue that a treaty is by itself effective only within the bounds of international law, and therefore that in order to make it effective within the scope of domestic law, it is necessary to enact a new law or issue an Imperial Ordinance in conformity to the object of the treaty lest the state should be held responsible in case it should fail to fulfil duties accruing from the treaty by the refusal of the Gikai to give its approval to a law bill which might be proposed out of unforeseen necessity. Considering, however, that the refusal of the Gikai to approve a bill lies within its proper authority, that if on that account there should result a violation of a treaty, it would amount to the non-recognition by the Constitution of the binding force of a treaty and to dividing the state will into two separate contradictory parts, one the state will viewed in the light of international law and the other in that of domestic law.

Clearly this cannot be a right view. Still others argue that a treaty determining domestic regulations becomes effective with the approval of the Gikai simultaneously within the two scopes of domestic and international laws. Such is, however, the view held by the constitutions of France, Germany and certain other countries, and in a country like Japan, where the conclusion of treaties is unconditionally within the sovereign authority of the Tenno, the consent of the Gikai cannot be interpreted as the source from which the effects of treaties emanate.

The state will is indivisible; and, therefore, the state as the subject of international law and that of domestic law are one and the same state, whose will is always one and indivisible. When the state gives its decision to any particular matter through diplomatic negotiations and a treaty comes into existence effectively, the state will is already determined in this respect, and therefore there is no reason why it should be determined otherwise on the basis of international law. It is because a treaty including domestic provisions becomes effective as a domestic law simultaneously with its conclusion. To be more particular, a treaty is indeed a contract between states, but these are each a body of individuals; and, therefore, the state will naturally restricts the people. Consequently, when the state concludes a treaty meant for domestic application, the people are inevitably restricted by the state will, with the result that the treaty at once restricts the people.

It must be noted, however, that in case a treaty does not determine regulations for domestic application on account of its simply promising to enact a law with specified provisions, then that treaty does not become effective as a domestic law, since it will be followed by a new law made and duly promulgated in conformity with the object of the treaty. When the state is thus charged with the duty of legislation, it may be taken as having promised to enact a law on condition of the Gikai's approval, from which it follows that even in the case of the state's failure to obtain it, it could not constitute a violation of the treaty.

In England, too, the conclusion of treaties is within the sovereign power of the king, who causes the foreign minister to attend to it, without the consent of Parliament, but with the assistance of the cabinet. It happens, however, that a treaty concluded needs the consent of the House of Commons afterward, as in the case of (a) a treaty for cession of territory in peace times, (b) a treaty involving revision of laws relative to the rights of the subjects, (c) a treaty involving payment of money, and (d) a treaty relative to the postal or telegraphic service. These are all invalid unless the Commons approve them or they are enacted according to regular parliamentary procedure. The consent of the Commons is usually given immediately after ratification or, when Parliament is not sitting, within fourteen days after its opening, provided the Commons decide

in its favour. Besides, all these treaties need recognition by Acts of Parliament, which are public laws, and not private laws. It must be added that all treaties must be presented to Parliament after ratification. In the United States, the Federal constitution provides thus: "He (the President) shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Thus the President has the power to conclude treaties, but without the advice and consent of the Senators, he cannot use his power. The French constitution provides as follows for making treaties and restraining the executive: "The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the Houses as soon as the interests and safety of the state permit. Treaties of peace and of commerce, treaties which involve the finances of the state, those relating to the status of the persons and to the right of property of French citizens in foreign countries, shall be ratified only after having been voted by the two Houses. No cession, exchange, or annexation of territory shall take place except by virtue of a law."^① The provisions are, however, interpreted in a narrow sense.

According to the Japanese Constitution, conclusion of treaties rests with Imperial decision, which is subject to no restriction whatever, but a

^① Fundamental Laws of France: Constitutional Law of July 16, 1875, Art. VIII.

treaty involving payment of money or the enactment of a law requires the consent of the Gikai. The Gikai, however, is under no obligation to give its consent to it, so that one may suppose it may sometimes not approve it. In case a treaty involves payment of a specified amount of money, the inability to observe the treaty for budgetary reasons may be avoided by virtue of Article LXVII of the Constitution; but in case the treaty involves the necessity of enacting a domestic law, it requires the consent of the Gikai, without which a violation of the treaty will be the inevitable result. In this respect the Tenno's authority to conclude treaties may be said to be subject to certain restrictions. In the United States, the President makes treaties necessarily with the consent of the Senate, and no such inconsistency as is seen in Japan may easily be avoided. Further, the Senate has not only the right to say Yeas or Nays to a treaty, but also the right to amend it, in which case negotiations may be reopened. It is also possible that the nature of the amendment may make such negotiations impossible. Negotiations on the Arbitration Treaty of 1897 were dropped half way because of the hostile amendment proposed by the Senate.

CHAPTER XXIII

FINANCES

SECTION I THE BUDGET



BUDGET is an estimate of the revenue and expenditure of the state instituted by the consent of the Gikai and with Imperial sanction. It is binding upon the government virtue of law and achieves the effect of supervising ment by the government's acts relating to finances. As to its legal nature, however, the theories vary. Some hold that a budget is a letter of attorney for financial management directed to the government by the Gikai. Others argue that it is a law. Still others say that it is intended to relieve the government beforehand of its responsibility to the Gikai. And so on. All these views, if carefully examined, will be found not sufficiently convincing.

It is true, governing a country involves huge expenses along countless lines, but if all of them were to be met as often as occasion required by taxes collected from the people, the state finances would become disorganized beyond control. It is for this reason that the fiscal year is instituted and an annual estimate of revenue and expenditure is made beforehand by showing a contrast between them. This estimate is none other than a budget. This estimate, or the budget has a certain binding force upon the

government. Legally considered, it may be said to be an order directed to the government to acquire revenue and defray expenses by strict observance of it. Who issues such an order? It is none other than the Tenno. The budget may therefore be said to be an Imperial ordinance directed to the government. In England, the budget is a mere estimate of the revenue and expenditure of the state, which is not the case in Japan. Here in Japan, the budget is an estimate of public accounts requiring for its institution the consent of the Teikoku Gikai and Imperial sanction and having a binding force according to law; while in England the budget has in itself no binding force whatever. There the consent of Parliament is sought with regard to the expenditure act bill, the finance act bill, the fixed fund act bill, etc., and not with regard to the budget. This naturally means that the budget has no binding force. The binding force emanates only as the effect of the expenditure act and other statutes.

SECTION II THE PROCEDURE FOR BUDGET-MAKING

A budget is prepared for each new fiscal year, which is the budgetary system. When special need arises, however, it is impossible to adhere to this system, and a continuing expenditure fund may be determined upon to cover a desired number of years for the amount in excess of the estimated appro-

priations or unprovided for in the budget. The expenses to be met during the continuance of a particular work or service for a specified number of years must have been approved by the Gikai, and therefore no curtailment can be made by the Gikai of the already made appropriations for any one of those years. The balance of each year's appropriations can be brought forward and used until the completion of the work or service in hand.

The government's fiscal year begins on April 1st each year, and ends on March 31st the following year. In some countries, the fiscal year is made to correspond to the calender year, while in others it covers the period between July 1st and June 30th of the following year. Our budget is instituted with the consent of the Gikai, and so the Law of Finances provides that a budget bill shall be introduced at the outset of the session of the Gikai in the year previous to the particular year for which it is prepared.

It is the government only that introduces a budget bill. As to the introduction of a law bill, there is no constitutional restriction, and it rests with the government as to which of the two Houses to present it. Only with regard to a budget bill, Article LXV of the Constitution provides that it shall be first laid before the House of Representatives. This practice of presenting a budget bill to the Lower House originated in England, then was adopted by the Netherlands and Belgium, then by

Prussia, and finally by Japan. The same is the case with the United States. In England, this practice became established about the seventeenth century, when the House of Commons was ascendant over the House of Lords and was eventually made the place where the purposes for which money tributes to the king were to be used were determined. This circumstance led to the practice of first introducing all bills, especially budget bills, in the House of Commons. The House later came in possession of this priority additionally on the ground that the Commons, being elected by the entire people, were in a more advantageous position than the Lords to ascertain the capacity of the people to bear the burden of state expenses estimated virtually by the people themselves. This reason is becoming less valid now that the Lower House has emerged from a mere assembly of the people's representatives into the organ of state government, and the people themselves are well aware of the Lords' sufficient knowledge of the national circumstances and economy.

When a budget bill is approved by the House of Representatives, it is forwarded to the House of Peers, after approval by which the budget becomes instituted. In giving deliberation to a budget bill, either of the Houses may increase the appropriations or make new titles and paragraphs, but the usage in Japan permits only a very limited increase. Any considerable increase or addition of new titles and

paragraphs would mean the proposal of a new budget bill, which would amount to an infringement of the government's right of introducing a budget bill. Such acts are hardly permissible except on very rare occasions. In England, a budget bill is presented to the expenditure and revenue committee after a financial speech by the chancellor of the exchequer. Two statutes give recognition to the expenditure, viz. the annual expenditure act and the fixed fund act; while the revenue is recognized by the taxation act and the national loan Act. The fixed fund act is an act of Parliament whereby recognition is given to the partial expenditure extending over the period from April to August in view of the fact that not until August, when Parliament closes, is recognition given to the entire appropriations by the all inclusive annual expenditure act. In England, too, the initiative to propose a bill appertains to the king, so that it is impossible for Parliament to increase the estimated appropriations or move and decide on expenditures exceeding the budget.

Both Houses of the Gikai have power to deliberate freely on a budget bill introduced, with some exceptions, which are as follows. (a) The Imperial Household expenses. The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Teikoku Gikai, except in case an

increase thereof is found necessary. This is because of the fear of impairing the dignity of the Imperial Family by holding deliberations on anything like its expenditures each year. (b) A Continuing Expenditure Fund. By this is meant, as stated before, a fund for carrying on a continuing work or service out of special necessity. Once the whole amount of such a fund and an allotment for each year are decided upon and instituted, there is no further need of deliberating on it each year. (c) Fixed expenditures based on the sovereign authority according to Article LXVII of the Constitution and those incumbent upon the government as a legal duty. By the term *expenditures based on the sovereign authority* is meant items such as salaries of civil and military officers, those for the Army and Navy, those to be incurred on account of treaties and contracts, those as bonuses, rewards for merit and annuities, and all other expenditures to be incurred out of the State Treasury as acts incumbent upon the sovereign authority in the Constitution. The term *fixed* points to the items set forth in the budget for the previous year, approved and instituted by the Gikai. Annual expenditures necessitated by the laws include such expenditures as those of the Teikoku Gikai, pensions of retired officers, annual allowances for Gikai Members, the expenses of the judicial courts, the Court of Administrative Litigation, and the Board of Audit, and all other expenditures prescribed by law. Annual ex-

penditures to be incurred by the government include such as are to be met by the government on account of contracts with individuals, corporations, and foreign governments, and for other causes. The principals of national loans floated according to law, and the interest thereon, subsidies for navigation, colonization, encouragement of industries, etc., and reparations are included in the expenditures to be met by the government on account of the laws.

The budget for a fiscal year must be instituted before the beginning of that year, viz. before March 31st of the previous fiscal year, otherwise the budget would be put into effect. Failure to pass a budget occurs (a) when the Gikai has not taken up the budget bill for deliberation, (b) when it has rejected it, (c) when both Houses have been closed before the passing of the bill, (d) when there has been a dissolution of the House of Representatives before the ending of the deliberations on the budget bill, and (e) when the bill has failed to obtain Imperial sanction. Even in case of failure to pass a budget, the state expenses cannot go unincurred, and therefore Article LXXI of the Constitution provides against such a contingency to the effect that, in this case, the budget for the previous fiscal year shall be carried out. If by any chance that budget, too, remains uninstituted and the budget for the year before was carried out, then that same budget must be carried out again.

SECTION III THE EFFECT OF THE BUDGET

Article LXII of the Japanese Constitution provides that anything and everything pertaining to taxation and tariff shall be determined by law, and so the government can collect taxes according to law, whether or not there is a budget. The government can also collect administrative charges and other items determined by order, whether or not there is a budget, as long as that order remains effective. In short, the primary object of a revenue estimate is to determine thereon the amount of expenditures to be incurred during that revenue year. Article III of the Law of Finances provides, in effect, that the fixed amount of expenses for each fiscal year shall be defrayed out of the revenue of the same year. The words *revenue of the same year* does not necessarily mean the amount of revenue estimated. If as a matter of fact there is revenue other than that estimated, it may be included in the expenditure fund for the same fiscal year,

A revenue estimate, unlike an expenditure estimate, is a legal estimate for expenditures. The Japanese Constitution makes no provision on this principle. It provides simply thus: "The expenditure and revenue of the State require the consent of the Teikoku Gikai by means of an annual budget. Any and all expenditures overpassing the appropriations set forth in the titles and paragraphs of the budget, or that are not provided for in the budget, shall

subsequently require the approbation of the Teikoku Gikai." Considering, however, further provisions for possible exceptional cases, the above article may be said to show simply the fundamental principle of the prohibition of any expenditure without consulting the budget. A revenue estimate is thus the standard for expenditures with a binding force on the administrative offices. To be precise, (a) no expenditure is permissible when overpassing the appropriations in the budget or unprovided for therein, (b) no appropriations shall be diverted to purposes other than the original ones, and (c) the budget concerns a current fiscal year only, and no sums appropriated in it can be brought forward to succeeding years, and be used. This is a principle observed equally in England as well as in Japan, and is called the Principle of Fund Allotment.

It may be noted that the administrative offices are under obligation to adhere to the budget in all their expenditures, but it does not necessarily mean that they must dispose of all the appropriations. For, indeed, a budget is originally intended for putting restraint on the financial side of the business of the administrative offices, thus to prevent wasteful expenditure. In England, where, as has been said elsewhere, a budget has in itself no binding force, it is the Expenditure Act, the Revenue Act, and other statutes that have a binding force, so that the effect of a budget may be said to be felt far less strongly than in Japan. For the effect of a

budget in that country amounts to no more than a reference for the House Committee of the House of Commons in drafting the Expenditure Act and all other bills. This much is certain that the House Committee sees to it that the law bills relating to revenue and expenditure are so drafted as to fall in with the budget.

SECTION IV EXCESS OVER THE BUDGET,
EXTRAORDINARY DISBURSEMENTS,
AND URGENT FINANCIAL DISPOSITION

(1) *A reserve fund.* A reserve fund is provided in the budget in order to meet extraordinary expenses exceeding the estimates or not provided for in the budget. Disbursements out of a reserve fund are made without the consent of the Gikai which it is necessary to obtain at subsequent times. The reserve fund is divided into two, the first and second reserve funds. Disbursements exceeding the estimates in the budget are made out of the first reserve fund, and extraordinary disbursements are made out of the second.^① By *extraordinary disbursement* is usually meant the defrayment of sums exceeding the estimated appropriations in the titles and paragraphs in the budget or that of expenses unprovided for in the budget, but these are each, in fact, one mode of ordinary disbursement within the limits of the budget, being made out of the reserve fund which is a part of the budget itself. As

^① The Law of Finances, Article IX.

has been said, however, any disbursement out of the reserve fund is after all an emergency defrayment of expenses unexpectedly incurred, and therefore the consent of the Gikai is required for it at a subsequent date. It must be noted that the consent of the Gikai is not calculated to confirm an accomplished act which might be rescinded or to legalize an illegal act. It simply works as a means to receive the expression by the government of the fact that it has made the disbursement with most scrupulous care. In England, too, disbursements in excess of estimated appropriations are legally recognized and a reserve fund is provided to meet expenditures extra to the Annual Expenditure Act or to the Fixed Fund Act. All those expenditures are to be reported at the next session of Parliament to the Settlement Committee and to the Annual Expenditure Committee, in order to obtain the approval of Parliament.

(2) *A supplementary budget.* The Constitution provides in Article LXIV thus: "The expenditure and revenue of the state require the consent of the Teikoku Gikai by means of an annual budget." The Law of Finances stipulates in Article II: "The taxes and all other income shall be considered as revenue, all expenses to be defrayed, as expenditure, and both the revenue and expenditure shall be set forth in a budget." This shows that a budget is one and indivisible. Sometimes, however, a reserve fund is not sufficient to meet the requirements,

or circumstances may call for extraordinary expenditures within the current fiscal year. Here arises the necessity for a supplementary budget. Article VII of the Law of Finances provides thus: "No supplementary budget bill shall be introduced except when deficiencies are caused in the estimated appropriations for indispensable expenses or for those based upon a law or a contract." Thus it will be seen that any appropriation in a budget bill, which was rejected in the previous session of the Gikai, may be introduced again in the form of a supplementary budget, provided it comes under the provisions of the above article.

(3) *Emergency financial measures.* When the sums appropriated in the ordinary budget and the extraordinary budget, i. e. the reserve fund have, all been paid out, a supplementary budget may, as has been said, be introduced in the Gikai for its consent, but it is sometimes impossible to convoke an extra session of the Gikai, against which case the Constitution provides in Article LXX thus: "When the Teikoku Gikai cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the government may take all necessary financial measures, by means of an Imperial Ordinance." An emergency financial measure must not be introduced except on condition (a) that it is necessary for the maintenance of public safety, (b) that there is an urgent necessity, (c) that the Gikai cannot be con-

voked owing to the external or internal condition of the country, and (d) that it be proclaimed by means of an Imperial Ordinance. The words in the Constitution "when the Teikoku Gikai cannot be convoked owing to the internal or external condition of the country" point not only to one condition for the promulgation of an emergency Ordinance provided for in Article VIII of the Constitution, viz. "when the Teikoku Gikai is not sitting," but also, at the same time, to such cases as when, owing to war or disturbances, all communications are cut off in the country or when the House of Representatives has been dissolved and a general election has not yet been held, rendering the convocation of the Gikai impossible. When an emergency financial measure has been taken, it is necessary to obtain the consent of the Gikai at its next session. Even in case of failure to obtain such consent, the measure taken by the government does not lose its effectiveness.

When there is a deficit in excess of a reserve fund, it may be covered by the surplus of the treasury, which is known as disbursement on the government's own responsibility and has been in practice by the government ever since the 24th year of Meiji (1892), notwithstanding that there are no provisions of law concerning it. It is doubtful, however, whether this kind of disbursement is legally justifiable, especially when it is taken into consideration that the Law of Finances provides in Article XXVI that any surplus in the treasury shall be

transferred to the revenue of the next year. It is right to say that it is illegal, for the defrayment of any sums exceeding the estimates or of expenses extra to the budget may be made out of the reserve fund established by Article LXIX of the Constitution, while any deficit in the reserve fund may be covered by means of a supplementary budget or by an emergency financial measure, there being no room left for the kind of disbursement above mentioned.

SECTION V FLOTATION OF LOANS AND EXTRA-BUDGETARY LIABILITIES

Article LXII of the Constitution provides thus: "The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the budget, shall require the consent of the Teikoku Gikai." By a *national loan* is meant a debt contracted with the object of thereby supplying a deficit in the fund needed for state government. It does not mean a temporary borrowing of money, but a long term loan. A temporary debt contracted, such as the flotation of Treasury notes, redeemable within a certain fiscal year, does not require the consent of the Gikai.

Besides national loans, all contracts to the charge of the state treasury extra to the budget require the consent of the Gikai according to Article LXII of the Constitution. By these contracts are meant those that are to be executed after the end of a cur-

rent fiscal year. In other words, they are contracts involving expenditures other than those approved by the Gikai, such as guarantees for subsidies to the charge of the treasury for a period of several years. Such extra-budgetary contracts, charged to the treasury, lead to financial disorganization; hence the provision that they be not entered into simply through the administrative function of the government, but with the consent of the Teikoku Gikai. Liabilities due to contracts to the charge of the treasury extra to the budget must be distinguished from expenditures appertaining to the legal obligations of the government as provided in Article LXVII of the Constitution. These latter, it must be noted, are based upon law, even when they result from contracts, and therefore these contracts do not require the consent of the Gikai. It may be added that a treaty is a kind of contract, but the conclusion of a treaty appertains to the sovereign authority of the Tenno and does not require the consent of the Gikai. It does not fall under the category of extra-budgetary contracts, but is an already fixed expenditure based by the Constitution upon the powers appertaining to the Tenno.

SECTION VI THE STATEMENT OF ACCOUNTS AND THE BOARD OF AUDIT

The revenue and expenditures of the state must obtain the recognition of the Board of Audit and of the Teikoku Gikai. A statement of accounts is

prepared by the Finance Minister, and is divided into two parts, i. e. a general statement and a statement of special accounts. It is first submitted to the Board of Audit for audit and then, accompanied by an audited report, it is presented to an ordinary session of the Gikai the following year. The official organization of the Board of Audit is determined by law; it cannot be determined by means of an ordinance. The board is composed of a President, two section-chiefs, and eight official auditors. These auditors, like judicial officers, have a status of their own as against the Ministers of State, and may not be relieved of their posts or placed on the retired list, against their will, except by criminal or disciplinary procedure. In England, auditing is carried on by the auditors, who are administrative officials, and by the House of Commons. The President of the Board of Audit is appointed by royal order and examines the revenue and expenditure, reporting thereon to the House of Commons afterward. As in the case of a judicial officer, he may not be deprived of his post during good behaviour, nor is he dismissed unless by a common representation to the throne by both Houses of Parliament.

PART VII
THE SCOPE OF GOVERNMENT
CHAPTER XXIV
TERRITORY

THE territory constitutes one essential element of the make up of a state, and is the sphere within which sovereignty is exercised as a matter of fact. The object of sovereignty is originally the subjects, but since these occupy a certain fixed area of territory, it may as well be said that the territory is the object of sovereignty. Sovereignty can acquire, cede, and lease territory, on one hand, while on the other it can divide it into parts and use them for the purposes of government and perform the act of directly governing the territory. Sovereignty is exercised all through the length and breadth of the entire territory, within which there is no other power superior or equal to it. Even foreigners, who come within the territory, must obey the sovereign power. The functions of sovereignty, performed over the territory as the object of government, are usually called territorial rights.

The territorial rights thus give full play to sovereignty within the territory, demanding obedience whether of man or of objects, with the exceptions

of the sovereigns and presidents of foreign countries, ambassadors, ministers, armies, warships, etc. possessed of extra-territorial rights by virtue of international law. Territorial rights have thus a positive effect within the territory, while they have a negative effect of repulsing the inroads of foreign sovereign powers into the territory. Some places may seem to be under the sovereignty of more than two countries, such as, for instance, occupied areas in war times, leased territories, regions under consular jurisdiction, areas of an international nature, territories under mandate, areas under extra-territoriality, and protectorates, but, in reality, their territorial rights belong to a single country. The following reasons may be cited. First, in an occupied area, the sovereignty of the occupying country seems complete, indeed, but the fact of the matter is that the original sovereignty in the occupied area is temporarily suspended by force of arms. Secondly, in a leased territory, the lessee country indeed exercises sovereignty for a fixed period of time with the consent of the lesser country, but it is still the territory of the lesser country all the same, and no cession of territory for a fixed term as some international jurists say. The same interpretation holds with regard to regions under consular jurisdiction, areas under extra-territoriality, and areas of an international nature. Thirdly, as to the South Sea Islands, mandated to Japan under the League of Nations covenant, they are practically the territory of Japan in that

the sovereignty of Japan is exercised there by mandate. Lastly, as to a protectorate, where the sovereignty exercised is not of a primitive nature, but is of the nature of a right granted by international treaties, the internal affairs are indeed subject to interference by the protector country, but even then such interference is based upon the recognition of the protected country, and therefore the latter must not be interpreted as having passed into the hands of the former. Loss of the whole of the territory means loss of the objective of sovereignty, which in turn means the downfall of the state; but the cession of a part of the territory does not lead to the downfall of the state, the size of the territory having nothing to do with the existence of the state.

The provision for the indivisibility of the territory in the constitutions of most European countries has its origin in this principle established by the royal house laws of those countries, for preventing the possible loss of royal dignity by partition of the territories, which were generally conceived to be private royal property in the Mediaeval Ages. In a country where the extent of the territory is fixed by the constitution, no part of it can be ceded to another country without altering the constitution, while in a country where it is determined by ordinary law, the same can be effected by means of a change in law. In Japan, where the supreme power of diplomacy appertains to the Tenno, any change in territorial extent is solely in the hands of the Tenno.

As to whether the laws become effective, as a matter of course, in a newly acquired territory, there are provisions of law. For instance, the enforcement of all the laws or part of them in such new territories as Chosen^①, Taiwan^②, and Kabafuto^③ was determined by Imperial Ordinances each time. When any part of a territory has been ceded, that part is no longer under the original sovereignty, and consequently the original jurisdiction becomes reduced by law. Then again, the laws that have been in force in that part alone become ineffective, because they lose the conditions necessary for their existence. A change in any part of a territory does not necessarily mean a change in the nationality of the people inhabiting it, and so it is necessary that a country which comes into possession of a new territory should decide whether or not to give its nationality to the people of that new territory.

^① Law No. 30, March, the 44th year of Meiji (1911), "Rules for Enforcement of Laws in Chosen," Article IV.

^② Law No. 3, the 10th year of Taisho (1921), "Rules for Enforcement of Laws in Taiwan," Article I.

^③ Law No. 25, the 40th year of Meiji (1907).

PART VIII

REFLECTIONS

CHAPTER XXV

REFLECTIONS ON THE JAPANESE CONSTITUTION

ALL that has been said in the foregoing chapters necessarily needs summing up: hence these reflections. They will however, be more than perfunctory, as it is felt necessary to compound the gist of what has gone before with what has been left unsaid, both intentionally and otherwise, in order that the reader may be the better enabled to digest and synthesize and thus to finally grasp the essence of the whole. The first and the most important fact about the Japanese Constitution is that it is the revelation of the Great Way of the Sun Goddess through the august will of Meiji Tenno, in whom it originated and by whom it was granted and promulgated. It is, in the truest sense of the word, the Tenno's Constitution.

Outside Japan—the Land of the Rising Sun—the first constitution ever granted by any sovereign is that of Louis XVIII. (June 4, 1814). Then comes in order that of Friedrich Wilhelm IV. (December 5, 1848) and that of Czarist Russia (May 6, 1906). It

may be mentioned in passing that the first conventional constitution is the Magna Carta (June 19, 1215), followed in order by the constitution of the french King Louis Philip (August 14, 1830), often called the constitution of the July Revolution, and that of Prussia, promulgated on January 31, 1850 and in force until November, 1918.

It needs no saying that Japan's is a written constitution, which is not unusual in some modern states, but the fact that it stands in inseparable and all but identical relationship with the "Three Sacred Declarations," viz. the Preamble to the Japanese Constitution, the Imperial Speech at the Sanctuary of the Imperial Palace, and the Imperial Rescript on the promulgation of the Constitution, is another of its important characteristics, making it as unique and significant as the constitution of any state on earth. Promulgated under date of February 11 in the 22nd year of Meiji—the two thousand five hundred and forty-ninth anniversary of the foundation of the Empire by Jimmu Tenno—and first put in operation on November 11 the following year—the opening day of the first session of the Teikoku Gikai,—the Japanese Constitution most tersely and straightforwardly declares the fundamental principles of the state and the form of government in its seven chapters of seventy-six articles. In the Three Sacred Declarations above mentioned are clearely revealed fundamentals such as how and why the Constitution was granted, what it is for, how it should be interpreted and

applied, how it will work, and so on. These, combined with other constitutional laws, make up an inseparable and complete whole, giving full expression to the essential principle of the subjects' support of the Tenno in His exercise of the sovereign power.

Nor should any one fail to observe still another characteristic, viz. that the Constitution has a strong monarchical leaning, being grounded in the historical facts since the foundation, social phenomena, national traits and convictions, racial spirit, traditional faith, results accruing from social conditions, etc. Monarchism, or more precisely, "Imperial sovereigntism," is one of the fundamental principles upon which the Japanese Constitution is grounded. As may be seen from the divine words of the Sun Goddess delivered to her grandchild Ninigi-no-Mikoto on the occasion of his descent on this land, referred to earlier, and also from the words of Okuninushi-no-Mikoto spoken on the occasion of his bequest of the land, as mentioned in the "Kojiki," namely, "The Land of Ashihara where thou now standest is the country which Our descendants shall reign over and govern," it is a substantial unwritten constitution of the country, forever established since the foundation that it is to be governed by an Emperor, i. e. Tenno, of the same unbroken lineage as the Sun Goddess. To the same effect do indeed declare the provisions of Articles I and IV of the Japanese Constitution and of Article I of the Imperial House Law, but these are simply a

formal confirmation of the fact both to the subjects and to foreign nations. The fact of the country being a monarchy, a hereditary monarchy, a country where the Sovereign and the subjects are as one, as one family, perfectly united as between man and man, in the ideals of coöperation, of coexistence, and of common share in happiness and sorrow—this fact was already firmly established with the foundation. The fact stands on the ever-solid unity of society and the never-changing convictions of the nation—circumstances quite natural to the Japanese race from the very beginning. It has a background, both psychological and spiritual, built up of the history and traditions of the foundation. It finds justification in the sum of social conditions, manners, and customs of the country. Over and above, it is attended with a peculiar significance, moral and religious, almost to the extent of religious faith on the part of the subjects. It will remain unchanged as long as the Japanese race shall last. It indeed shall be coeval with heaven and earth. Such is truly the glory of the Empire, unparalleled in all the world.

This Imperial sovereigntism, further analyzed, will be seen justly revealed in the facts that the Imperial Throne is succeeded to by a Tenno always of the one unbroken lineage, that the Japanese Constitution is not of the nature of a contract, having been granted by the august Tenno, that all affairs of the Imperial Family including succession to the Throne are under the personal supervision of the reigning

Tenno, and that everything centres in the Taiken, or the supreme authority of the Tenno. Of these important facts, the second needs special consideration.

The Japanese Constitution was, it cannot be too often repeated, granted by Meiji Tenno, in fulfilment of the august announcement which he graciously made in the Imperial Message granted on the occasion of the inauguration of the Teikoku Gikai on October 12 in the 14th year of Meiji, thus: "We hereby do propose to open a Gikai in the 23rd year of Meiji by appointing necessary members, in accomplishment of Our original intention, and order Our court officials to lay down the plan within the time We shall allow. The organization of the Gikai and the authority thereof shall be determined under Our supervision and shall be promulgated in due time." Then in the Imperial Speech on the promulgation of the Constitution the same Tenno says: "We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants." As to revision of the Constitution, if such is necessary in the future, the reigning Tenno alone has the right to propose it, as is provided for in the Preamble and Article LXXIII of the Constitution. Even a Prince Regent has no such right, as Article LXXV clearly states. Nor has even the Teikoku Gikai such a right as is set forth in the Preamble. All this is a fact

which has no parallel in other countries, and it is worthy of attention that, in carrying out any revision, there is a fairly extensive restriction imposed upon the functions of the Gikai Members with regard to deliberation and decision, as may be seen from the provision of Article LXXIII of the Constitution. This testifies to the solidarity of the principle of "the Tenno's own constitution." In other words, it is an amplification of that principle tempered with the principles of a rigid constitution. It may be added that no person is permitted to present a petition relating to revision of the Constitution, as is set forth in Article XI of the Ordinance on Petition and Article LXVII of the Law of the Houses.

Two facts regarding the principle of the "Tenno's own constitution" require attention. First, the Japanese Constitution, which was established by the sole will of the Tenno, is after all what was promulgated and put in operation as the expression of the state will, and therefore the Tenno Himself gave His instructions to the subjects as to how it ought to be respected, swearing His allegiance to it to the spirits of the Imperial Ancestors at the head of His subjects. If necessity should arise for revision, it is but natural and reasonable that He should carry it out in conformity with the provisions of the Constitution. Secondly, it must be remembred that when any doubt arises about the interpretation of the Constitution, the Tenno should not be approached for a solution. In such a case the solution should be

reached from the logical side, there being no provision in the Constitution by which any machinery of the state is granted the sole right of interpretation. In other words, the three mediums—the Legislature, the Judicature, and the Executive—may be said to have each its own right of interpretation. To be more particular, the Teikoku Gikai, the courts of law, and the administrative mediums have respectively their own right of interpretation in their respective spheres, and the interpretation of no medium of the state should interfere with that of another, although it must be specially noted here that the Tenno is at any time the sole interpreter of the Constitution, most supreme and unchallengeable. The only exception is the administrative mediums, which, being in principle under the control of the Tenno, are required to listen to whatever interpretation the Tenno may give. Two other independent administrative machineries, viz. the Court of Administrative Litigation and the Board of Audit, which are both established as independent by special laws, may be considered as possessed of their own right of interpretation just the same as the Teikoku Gikai and the courts of law. Thus every state machinery has its own right of interpretation in its own sphere and to a certain limited extent, there being no special machinery empowered to give out a final, definite, and authoritative interpretation. In case, therefore, there should be a divergence of interpretations among such machineries, there is no means whatsoever by which to settle the divergence. Prac-

tically speaking, such a divergence may indeed be settled by expedient means according to circumstances. For example, the difference in interpretation between the two Houses or between the government and the Gikai may be reconciled by seeking the interpretation of the Tenno himself, the holder of the supreme authority, thus to obey it unquestioningly. This is the obvious and proper step which is likely to be taken, considered from the nature of the form of government and the national spirit. Then in a law-suit entered regarding any controversy over the Constitution, the law court must be the rightful interpreter. In such a country as Japan, therefore, one method conceivable for seeking an authoritative interpretation capable of restraining all the machineries of the state is to create a court of litigation over differences in the interpretation of the Constitution, by revising and supplementing the Constitution. Another is to seek a legal interpretation by creating additional provisions in the Constitution for the method of interpretation. This circumstance, which looms up after all that has been said, may be considered still another characteristic of the Japanese Constitution.

The third phase of Imperial sovereignty before mentioned is the principle of the Tenno's direct disposition of certain affairs. To be precise, the Tenno disposes of all affairs relating to the Imperial Family, such as succession to the Throne, the Prince Regent, and the supreme authority of the Imperial Family,

together with such other affairs only as are of the utmost importance to the state. This he does, not as Tenno, who is Head of the Imperial Family, but as Tenno, who is the incarnation of the Sovereign power and of the state, in strict conformity with the Imperial House Law established by the Tenno himself, the Teikoku Gikai having no right whatsoever to participate in such disposition. It may be added that this law is not simply one for the Imperial Family, but a national law having power to restrain the machineries of the state and the subjects. For instance, with regard to succession to the Throne, Article II of the Japanese Constitution reads: "The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law." This is clearly a manifestation of the above principle. Other instances may be seen in Articles LXXIV.

The fourth phase of the Imperial sovereignty is prerogative government, i.e. government by the Tenno and with the Tenno and his Family in the centre, which is not on the same level as other known forms of government, such as monarchism, absolutism, despotism, parliamentary government, democratism, party politics, etc. Neither is it opposed to them; it belongs to an entirely different category.

Over and above what has been said to distinguish the Japanese Constitution from others, a great deal more remains to be said. It is but saying that the Japanese Constitution presents still more character-

istics to the author's view. Let us now consider them. One of them is seen in its adoption of the constitutional form of government, modified so as to suit the country, with the subjects' assistance of the Tenno's government in view. The ideals of the constitutionalism thus adopted are well revealed in the provisions for the centralization and harmonization of powers, for the Gikai, system, for the responsibility of the Ministers of State, for the system of the Privy Council, and for the judicial, particularly the jury, system. The Constitution also establishes a clear distinction between the Tenno's authority to hold sacred rites, political power, and military authority, while it makes them converge on one and the same point—the Tenno. By sacred rites is meant those rites the Tenno conducts as master of rites according to the ancient Shinto ways in order to offer homage to the spirits of the Imperial Ancestors and of the successive Tenno, and to the gods of heaven and earth.

The Japanese Constitution is also characterized by its provisions for the guarantee of the rights and duties of the subject, to whom it is granted on account of the assistance he renders to the Tenno's government. This fact indicates that the Constitution is not simply for clarifying the extent of the sovereign authority, as in other constitutions, but, indeed, it is meant to confirm the already existing reciprocal ties between the Tenno and his subjects.

Nor must it be overlooked that the Japanese

Constitution has provisions for the Tenno's power of issuing Emergency Ordinances in cases of urgent necessity to maintain public safety or to avert public calamities, when the Gikai is not sitting. So, too, is the Tenno empowered to proclaim a state of siege in time of national danger. These powers are quite distinct from His power to command legislation by means of the Teikoku Gikai. Both are called the two legislative systems, which again characterizes the Japanese Constitution.

Then there is the provision of Article LXX of the Constitution, which empowers the government to take all necessary financial measures, by means of Imperial Ordinances, in cases of urgent need for the maintenance of public safety. It is true there are similar provisions in the constitutions of certain other countries, but at any rate the above article may be reckoned as still another of the many characteristics of the Constitution. Then Articles LXVII and LXXI must not be left unnoticed, of which the former provides for already fixed expenditures based by the Constitution upon the powers appertaining to the Tenno, for expenditures appertaining to the legal obligations of the government, and for such expenses as may arise by the effect of law. So far as the author's research goes, there is no such provision in the constitutions of other countries with the exception of Czarist Russia. As to the latter article, which provides that in case of the Gikai's failure to vote on the budget, that of the preceding year may be car-

ried out, there are certainly similar provisions in other constitutions, but still it, as well as the former article, may be considered as doing credit to the Japanese Constitution in that, by the former, the government is enabled to keep up its financial dignity in all its dealings, and, by the latter, affairs of state do not go unadministered even for one day.

Now we turn to the formal side of the Constitution. First of all, it is a noteworthy fact that every provision is made out in as terse a form as possible, and the entire Constitution is made up of as few articles as possible, while it furnishes all the principles underlying the existing enacted laws of the Empire. Then, unlike most other constitutions, the Japanese Constitution has no article fixing the date for its coming into effect, such being separately fixed in the Preamble of the Imperial Rescript. Thus it reads: "The Teikoku Gikai shall first be convoked in the 23rd year of Meiji (1890), and the time of its opening shall be the date when the present Constitution comes into force." So it indeed came into force in that very year, and never since has it undergone any revision whatsoever—the imperishable great code of the Empire, as it is often called. To this Constitution, a grant of the Tenno, it may be mentioned, the Tenno took no allegiance, which may seem rather unusual, especially when one considers that in most countries of Europe and America the constitution has invariably one or two provisions for the taking of allegiance by the ruler to such effect. In Japan such an act is

unknown to the Tenno, although He reported the promulgation of the Constitution to the spirits of the Imperial Ancestors and to the gods of heaven and earth, as in the case of His accession to the Throne.

Two things more need attention. One is that in the very beginning of Article I occur the words "The Empire of Japan," by which is meant all the length and breadth of territory where the Tenno's sovereign power prevails, the elasticity of these words being preferred to any concrete mention of particular place-names. In certain other constitutions one will find the extent of territory to which the sovereignty extends clearly outlined in concrete words. The other, which is peculiar to Japan, is the existence of what is called *Genro*, (元老) i. e. elder statesmen. They are those who have been granted a special treatment as such by the Tenno, according to the constitutional custom of the country, and of whom the Tenno enquires about such affairs of the state as are of grave importance. Properly speaking, they are quite outside the sphere of the Japanese Constitution and of the Official Organization, the name *Genro* being neither an official term nor a title nor an honour. The term has its origin in the Chinese classics. The existence of such men, though few or none, to which the Constitution gives recognition may be worth the curious attention of Westerners.

All that has been said in the above two paragraphs, coupled with what already went before,

constitutes the unmistakable entirety of the characteristics of the Japanese Constitution, behind which one must not fail to see the existence of a few peculiarities of the Japanese state itself. These are indeed the backbone supporting the Constitution.

CHAPTER XXVI

REFLECTIONS ON THE JAPANESE STATE



FIRST and foremost one must not overlook the imperishable nature of the state, firmly established in the remote past. The fact, or rather predestination, admitting of no challenge, no contradiction, that it shall be coeval with heaven and earth has been pointed out by many Japanese scholars, but their arguments in most cases fall far short of being convincing. All this is because they miss their mark in the basis of their argument; hence various absurd forms of logic. One of them, though well meant, takes up the unparalleled position of the Japanese state in the world as one important factor of the imperishability of the state, and tries to explain it away by the fact of its long existence. A reflecting mind will readily discover the fallacy of this explanation, which is, however, fairly widely accepted, in most cases for its plausibility. Certainly no one will contradict the pride of the state in having enjoyed its independence for more than two thousand six hundred years. Indeed, in the "Nihon Shoki," Jimmu Tenno, the first Tenno, is referred to as having said: "There have passed more than 1,702,470 years since the descent of the Heavenly Ancestor." Since this is so, as all

Japanese believe, what an immense length of time yet before must have been, then, the time of the Sun Goddess! The words of Meiji Tenno in the Imperial Rescript on education, "Our Imperial Ancestor have founded Our Empire on a basis broad and everlasting," are the exact verification of this ancient fact of facts. Certainly there can be no objection to the Japanese taking pride in such a long existence of their country. Any attempt, however, to base on this fact anything like the essence of the Japanese state, or the imperishability of the state would be a downright absurdity.

For, indeed, if long existence is the only thing that matters, there are many countries as old, and even older, than Japan. China was founded about four thousand years ago; India about three thousand four hundred years ago; Egypt, the most ancient and once the most civilized country in the world, about five thousand years ago. All those countries still exist, though under various circumstances, and they have equally the right to pride themselves on their long existence. Why should Japan alone be elated by the circumstance common to many others? Such indeed is blind pride. Then Greece and Rome—they were each founded about two thousand five or six hundred years ago, much the same time as that of Jimmu Tenno. Thus it comes about that although Japan may compare reasonably with other countries in point of long history, that is not reason enough for ascribing to it any dignity and glory

whatever, much less for accounting, even in part, for the imperishability of the state.

Now the imperishability of the Japanese state, in which the Japanese people believe as one man, is an established fact, a predestination, a heaven-ordained destiny, which cannot be understood except by careful inquiry into at least four important points, viz. (a) the great spirit of the foundation of the country, (b) the unbroken line of Tenno since the foundation, (c) the historical solidarity of the country's independence, and, last but not least, (d) the nation's firm conviction of the imperishability of the state—a conviction quite naturally rooted in their minds as a result of the combination of the ideal and the reality achieved, since ancient times, admirably and perfectly and without interruption.

The first of the above four points, viz. the great spirit of the foundation of the country, is, as has been reiterated before, fully revealed in the divine words of the Sun Goddess to her grandchild Ninigi-no-Mikoto on his descent on this land. There is none, throughout the whole realm, who dares to deny that this spirit has been, and is still being even at this moment, actually realized through all these long years.

Then, as to the unbroken line of Tenno, it is an absolutely clear, unshakable fact none can contradict in any way whatsoever. Here is again the fulfilment of the divine words of the Sun Goddess to Ninigi-no-Mikoto, which are: "The prosperity of

thy Throne shall be coeval with heaven and earth." As a matter of fact, the Japanese people have had over them, even to this day, the Imperial Family of one unbroken lineage ever since the accession to the Throne of the first Emperor, Jimmu Tenno. This is a fact worth sincerest esteem, a fact commanding highest dignity, unparalleled in any country, no matter how old its history. It is a fact eloquently attested to by various phenomena of Japanese history working, one and all, as faithful expositors.

One of those phenomena is seen in the circumstance incidental to the demise of Ojin Tenno, the fifteenth Tenno. According to the Nihon Shoki, the vacated Throne was to have gone to Prince Uji-no-Wakiirakko, second son of the deceased Tenno[®] in pursuance of the latter's will. Prince Oh-Sasagino-Mikoto^{®,} eldest son, too, encouraged Prince Wakiirakko, saying, "How could I ignore the will of our father Tenno and yield to the wishes of my brother prince to accept the Throne?" The younger, however, humbly persisted in declining the Throne on the ground that he was heir-apparent simply because of his deceased father's love, not because he had special talent, saying, "It is a great principle holding through all ages that the elder is above the younger and the younger is below the elder, just as sacred is the Sovereign and ignorant are the subjects. I beseech you earnestly to ascend the Throne with no scruple whatsoever. Let me, as a subject,

[®] Prince "Big Sparrow," later Crowned as Nintoku Tenno.

render you, in all sincerity, whatever assistance you may require." To this the eldest answered, saying, "The Imperial Throne shall not be left vacant even for one day. Therefore our father Tenno nominated you as heir solely on account of your virtue, with your son to succeed you and the people to obey you." Thus there seemed to be no end to mutual concession, until at last the younger put an end to his own life in a fervent wish to place the elder prince on the Throne, who was thus reluctantly made to accept the scepter. He was no less a Tenno than Nintoku Tenno, held in deepest reverence, as history attests.

Now regarding the tragic finale of this beautiful controversy, different minds may present different arguments, but to the Japanese mentality the act of the younger prince is simply awe-inspiring even to think of it; for in it is revealed all that is noble in the Yamato race, especially fraternal love and the spirit of giving precedence by the young to the elders, combined with his sincere wish as Imperial son to leave the Throne no longer vacant. Nor should the no less sincere wish of the elder prince to the same effect pass unnoticed; for it is a significant fact worth attention that the two princes should have so fortuitously coincided in their wish, as if by common consent. This coincidence was nothing other than a spontaneous manifestation of the latent idea common to both, viz. that the Imperial Throne shall not be left vacant even for one day;

and it is the spirit underlying this very idea that has been most contributory to the beautiful fruit of the one unbroken lineage of Tenno. As to the concessive step taken by the younger prince, it may be added, it is not deemed necessary that the eldest should have succeeded to the Throne, for, although it was firmly established with the foundation of the country that there shall be no interruption to the succession to the Throne, succession by the eldest son was not always the rule in the remote past. Far from it, there are many instances of this kind, as in the case of Hiko-Hohodemi-no-Mikoto, son of Ninigi-no-Mikoto, who, in the mythological age, ascended the sacred Throne, taking precedence of the eldest, Honosusori-no-Mikoto[®]. So was it with Jimmu Tenno, who was the fourth son of Ugaya-Fukiaezu-no-Mikoto, and with Suisei Tenno, coming next, who was the third son. Thence downward does one see more instances of succession by a younger son than by the eldest. The insistence of Prince Wakiirakko on the propriety of succession by the eldest, in spite of the long-prevalent indifference to precedence, may therefore be best accounted for by the supposed influence of the Confucian doctrine introduced into this country in the time of Sujin Tenno, although such a spirit is no monopoly of Confucianism.

Further instances which demonstrate the establishment of the one unbroken line of Tenno

® "God-son, born in the Burning Fire," of Ancient Japan.

remain yet to be mentioned. One concerns the notorious Yuge-no-Dokyo, the priest, who, toward the close of the Nara Period (710-780 A.D.), started the rebellious plot to usurp the Imperial Throne, which is enough to make any loyal subject shudder even to think of it. He ordered Kiyomaro Wake to invoke an oracle at the Hachiman Shrine at Usa ostensibly about the advisability of his assuming the sovereign power, but secretly entrusting him to report the oracle, whatever it might be, in such words as were advantageous to his ambition. According to the "Zoku-Nihongi," Kiyomaro, who retained his unswerving loyalty to the Tenno, bravely reported the oracle in these words: "Since the foundation of the country there has always been a clear distinction between Sovereign and subject. No subject has ever been Sovereign in the past. The Imperial Throne shall be succeeded to by the heir-apparent by all means. The despotic insurgent shall forthwith be expelled."

Another instance concerns Lord Kitabatake Chikafusa, who wrote a laborious work "Jinnō Shōtōki" (1339 A.D.) in the days of political turmoil known as the Yoshino Period (1334-1392 A.D.) when the military class gained its highest ascendancy. Concerning his conviction on the legitimacy of the Tenno of the Southern Dynasty, he writes: "Dai Nippon is the gods' chosen land, where the Heavenly Ancestor laid the foundation and the lineal descendants have ascended the Throne in an unmistakable

succession. In no other country of the world is there the like of it: hence the name *Shinkoku*. These words are the exact representation of the essential nature of the country, suggestive of the stable continuity of the Imperial line which has ever been and shall be for all time to come. Even in these latter days after the lapse of six hundred years since the writer's time do they still whisper inspiration.

Further down, in the latter days of the Tokugawa Shogunate, when the authority of the Shogun was gradually waning with the increase of the foreign menace, and a general cry for the re-establishment of the Imperial régime was steadily leading to the revival of Japanese classical learning, thus inspiring the nation with the spirit of the foundation of the country, Aizawa Shoshisai, the eminent scholar in Mitogaku, or Mitology, viz. the Mito school of Japanology, wrote a book entitled "Shinron" (New Doctrine), in which he says: "Ever since heaven separated from the earth and there were men, the Imperial descendants have ruled over the Four Seas (the Realm) in unbroken succession and without change in the one dynasty. Never before has there been any subject who assumed the heaven-sent position (the Sovereignty). Such indeed is a fact never to be dismissed as mere chance." By these words he certainly meant to extol the glory of the country under the one unbroken line of Tenno originating far back in mythological times. He further says:

"In the remote past, when the foundation of the country was laid by the Heavenly Ancestor, the Throne was the heavenly seat and the Ruler's virtue was the heavenly virtue. In the carrying out of the heavenly task, nothing whatsoever, be it great or small, was there but was the will of heaven. The august virtue was like unto the jewel, the enlightenment like unto the mirror, and the authority like unto the sword. Embracing the benevolence of heaven, conforming to the lustre of heaven, and exercising the authority of heaven, the Heavenly Ancestor ruled supreme, lighting up all the countries of the world. And when at last the rule of the land was granted to the Heavenly grandchild, the Imperial Ancestor, with her own hand, handed him the Three Sacred Treasures as evidence of the heavenly grant and as the symbol of heavenly virtue, meant to serve as heavenly work, thus to make him carry out the heaven-sent task and transmit it to future ages. It is for such a history, indeed, that the dignity of the Imperial line is above all violation. The distinction between Sovereign and subject, thus definitely clarified, leads to a clear idea of the great justice."

What does the writer mean by all these awe-inspiring words? He means to say that the government of the country is a heaven-sent task to the Tenno, that the successive Tenno have always been of the lineage of the Imperial Ancestor—the Sun Goddess—that, in accordance with the will of the

Imperial Ancestor, they have always made a point of ruling with benevolence, that there must be a clear distinction between Sovereign and subject, and that there shall always be the continuity of the Imperial line, which originated in the Imperial Ancestor in the remotest past, under the circumstances reiterated before. The continuity of the Imperial line is thus, to the Japanese subject, an already established fact—a predestination.

Thirdly, the historical solidarity of the independence of the country needs attention as one factor contributory to the imperishability of the Japanese state. One must not lose sight of the fact that ever since its foundation, the country has never once been subjected to foreign rule, mere utterance of which words would indeed carry to the Japanese ear an indescribable sense of disgrace. Nor has it ever brought upon itself even a tiny bit of conscious disgrace whatsoever from its relations with other countries, although it had for a long time since Marco Polo's travels, not to speak of the Mongol invasion, been an object of envy to ambitious countries of Europe for its mild climate and rich resources, and, especially in recent times, it has always had to face menace from all sides, due to constant international complications on the Pacific. Not only that, one must not fail to see the ever-growing development the country has been making in defiance of all the adverse circumstances, thereby increasing national prestige abroad. One may try to contradict

such a statement by the mention of the name Ethiopia. It certainly was an old country and had a long line of emperors. In it may certainly be seen the like of Japan, if a history traceable far backward and a long line of rulers is the only thing that matters. It must be remembered, however, that its independence in the past was of a negative kind, it being far from civilized and infected with pestilence, with little menace from abroad. Anything like national development was a thing quite unknown there, the inevitable end being the loss of independence and absorption into Italy, as the world is well aware. Now let it be asked: What does all this point to? The answer must invariably be that it reflects ample evidence of Japan's remarkable potentialities of never-ceasing development. None that sees with an unbiased eye will hesitate to nod assent to this unchallengeable prospect of the country's continued independence into all eternity.

Among the many historical instances illustrating the undeniability of this heaven-sent everlasting independence of the country, the circumstance accompanying the diplomatic envoy sent to Sui, a kingdom of ancient China, in the time of Suiko Tenno, the thirty-third Tenno, deserves attention. History records that in the fifteenth year of the reign of Suiko Tenno the envoy, Ono-no-Imoko, took his credentials to Sui, which begins thus: "May it please Your Majesty, the Tenshi (Tenno) of the Land of the Rising Sun hereby sends His message to the

Tenshi of the Land of the Setting Sun. How is it with Your Majesty?"^① Upon perusal of this, the Emperor Yo, who had gained an ascendancy after the unification of the southern and the northern regime of China, muttered in bland amazement in spite of himself: "Away with thy barbarian nonsense! None of thy insolence again!" When, the following year, the same envoy went over to Sui again, this time taking with him some Japanese students and priests sent for study, the credentials read: "The Tenno of the East reverently causes his greetings to be conveyed to the Kotei (Emperor) of the West. By the previous visit of Our messenger Pei Shih Shing, Chang-kê of Hun-lu-ssu^②, we are satisfied that our long cherished desire was fulfilled. How is it with Your Lordship now that the chilly autumn season is here? We are here in usual health. We are pleased to send to you Our messengers Ono-no-Imoko^③ and Kishi-no-Onari^④, Reverently in haste." By such wording the then Tenno of Japan meant to associate with the emperor of Great Sui on an equal footing. This clearly coincides with the great spirit revealed in Article XII of the Constitution of Shotoku Taishi, consisting of seventeen chapters, which reads: "No country has two

^① See the *Wo Kuo Chuan* (倭國傳) in the *Sui-Shu* (隋書), i. e. Records upon ancient Japan in the history of the Sui Dynasty (589-617 A. D.) of China.

^② Committee of Reception to the Bureau of Foreign Affairs of the Sui Dynasty of China.

^③ Alias Su Yin Kao (蘇因高=小野妹子).

^④ Alias Hu Na Li (乎那利=吉士雄成).

severeigns; no man has two masters." In this is clearly discernible strongly emphasized the pride of the sovereign state in its own racial independence.

This reminds one of how the spirit of racial independence flamed up at the time of the Mongolian invasion. The Mongols came over twice, in the eleventh year of the Bun-ei Era (1274), during the reign of Kameyama Tenno and in the fourth year of the Koan Era (1281), during the reign of Go-Uda Tenno, on which latter occasion the ex-Tenno prayed and swore to the spirits of the Imperial Ancestors and to the gods that he would at any moment sacrifice his august self for the sake of the country. To this inspiring determination of the ex-Tenno gratefully responded both the government at Kamakura and the whole nation, with a stubborn and vigorous resistance to the enemy, till its eventual annihilation by the "providential storm." The historical fact that the entire country, from the Tenno to the commonest of his subjects, dedicated immense energy to the up-keep of the national independence is enough to bring home to the minds of the people the dignity of the heaven-ordained independence and imperishability of the Japanese state.

Further downward, the vigorous anti-foreign movement launched in the latter days of the Tokugawa Shogunate, the national cooperation admirably effected during the Meiji Era in the wars with China and with Czarist Russia, the nationwide indignation witnessed regarding the Three Power Intervention

after the war with China—all these facts are but revelations of the stubborn will of the nation to protect the sacred independence of the state from all hostile forces directed against it both at home and abroad.

After all that has been said in an attempt to prove the imperishability of the state, both as a principle and as a fact, there remains one thing that needs special mention, and that is the happy harmony of both fully chrystallized as an absolute whole controlling the thought of the people. In other words, it has become an absolute faith forming the background of the thought of the people. The absolute nature of the Japanese state, which will be dwelt on later, is thus idealized in the people's minds beyond all doubt and contradiction. It is discernible in all facts of Japanese life. A familiar example is seen in the deeds of the Japanese officers and men fighting at the front in the present China emergency. The shouts they utter in ecstatic tears on the castle walls they have occupied at the sacrifice of hundreds, nay thousands sometimes, of brave lives, or those they give brokenly and faintly when life is fast ebbing out, being shot by enemy bullets and shells and weltering in pools of blood—all invariably articulate as "Long live His Majesty the Tenno!" No Japanese is prompted to this act by any knowledge instilled in his mind, nor does any base it on any conclusion obtained from theoretical considerations. It is indeed a spontaneous manifestation of

an absolute faith, surpassing all theory—an outpouring of sincerest felicitation on the imperishability of the state under the unbroken Imperial line. It may thus be said that the imperishability of the Japanese state, while it is a heaven-ordained fact on one hand, has on the other been evidenced by the people themselves through all these long years by virtue of their strong faith, with the further promise of the same for all time to come.

It may then be asked: What makes the Japanese state alone imperishable? The answer is definite, that behind this particular attribute of the state is a foundational dignity, both legal and moral. This dignity may be considered from two angles, categorical and historical. True, facts give rise to a category and the category in turn embraces all those facts. However, in the case of the Japanese state, there is seen a perfect harmony of both, and therefore it is next to impossible to examine them separately. Aside from all argument in this connection, one thing is certain, that this state is a dignified existence, because it is a divine country. It is a country born out of divine will—a country ruled over and governed by the descendants of the gods. This fact is given clear expression to in the Kojiki and the Nihon Shoki. Further it is evidenced by historical facts. Then the categorical side of the dignity is in perfect accord with the great spirit of the foundation of the country—the spirit underlying the words of the Sun Goddess. Article III of the

Imperial Constitution providing that the Tenno is inviolable is on the one hand a confirmation after Western fashion of the inviolability of the sovereignty and of the irresponsibility of the sovereign, but it is on the other a strong assertion of the sanctity of the Tenno who, being a living god descended from the Sun Goddess, administers godlike government. The Tenno's inviolability in this latter sense has been the faith of the Japanese nation all through the past ages and so shall it ever be.

Such a categorical side of the dignity might be best grasped by inquiries into old legal documents, but in this country the constitution of Shotoku Taishi being the oldest of the kind extant, there is no other source to rely upon but the customary law prevalent in ancient times—the age of unwritten law or, more properly, the age of typical Japanese law, from the fact that the country was little under the influence of Chinese law. Traces of such customary law may be found in the Kojiki, the Nihon Shoki, and the Engi-Shiki-no-Norito^①. Then reference may be made to those chapters in the Hou-Han-Shu^② and int he Wei-Chih^③. Among all these records, the ancient Imperial Rescripts had in themselves the authority of *nori* (law) as the *nori* (law) of living gods. They had the effect of written laws

① Engi-Shiki-no-Norito (延喜式祝詞), i.e. a Shinto prayer offered to heavenly or shrine gods, at a Shinto ceremony called Engi-Shiki (written during the Engi Era, 905 A. D.)

② History of Later Han Dynasty (後漢書) (25-222 A.D.) in China.

③ History of Wei Kingdom (魏志) (220-265 A. D.) in China.

carrying a categorical significance. For, in ancient times, the customary law was based on *imi*, i. e. taboo, which was considered pleasing to the gods. Thus the precepts left by the successive Tenno were calculated to show the way for their descendants to follow, and obedience to that way was obedience to the gods' way: hence the authority of the ancient Imperial Rescripts.

Some particular instances illustrative of the dignity may be cited. One concerns the Eastern expedition of Jimmu Tenno, who when starting, said, among other things, to his brothers and sons: "In the remote past, Our ancestral gods bestowed the whole of this Land of Goodly Grain of Toyo-Ashihara (Japan) to Our Ancestor Ninigi-no-Mikoto." The words testify to the fact of the country belonging to the descendants of the Sun Goddess, concretely evidencing the divine words of the Goddess referred to before. The same Tenno also said: "Our Ancestors were all gods and were all sacred. It is an exceedingly long time since they piled felicities upon felicities and halos upon halos." These words of the Tenno fully express the sanctity of the successive Tenno and their godlike government carried on according to moral principles. Later, Prince Yamatotake said, on his expedition, to the enemy chieftain in response to the former's question: "I am the son of the living god." All these words, preserved to this day, bespeak the firm establishment of this solemn principle of "the Tenno over all the people." Thus

the whole land was known by the name of *Ōdo* (王土) i. e. the sovereign's land, which simply meant the land ruled over by the Tenno, and not occupied or possessed. As a matter of fact, the Tenno possessed a very small portion of the land. The rest was the common property of the people, who gathered into different villages according to different blood relations, all these, however, being of the same stock as the Tenno himself. The people, i. e. the different communities, were under the indirect control of the Tenno through the medium of the head of each. They were simply under obligation to render taxes, tribute, and labour service to the Tenno. Herein lies the moral dignity of the Tenno, and, therefore, of the state, in which the whole populace centred around the Imperial Family. Then the constitution of Shotoku Taishi provides in Article XII thus : "The state shall have no two sovereigns ; the people shall have no two masters. Millions of people in all the land shall regard the Sovereign as their Master. All officials appointed to their posts are the subjects of the Sovereign." Then at the time of the Reform of the Taika Era (646 A. D.), when Prince Naka-no-Ohoe, son of the Tenno of that time, who was anxious for a thorough realization of the principle of "the Tenno's land and the Tenno's people" through abolition of the old evil institution of private ownership carried to excess, took the initiative by surrendering his private land to the Tenno, saying, "There are no two suns in the heavens, nor

are there two sovereigns in the state. It is the Tenno alone who has the power to govern the land and command the people." About the same time, or more exactly in April of the 3rd year of the Taika Era (647 A. D.), the then Tenno—Kogyoku Tenno—said in his Imperial Rescript: "Our Ancestor god ordained that her descendants should forever govern the land. It is for this reason that the country has ever been governed by Sovereigns from the very beginning. Ever since the Imperial Ancestor (here Jimmu Tenno) first ascended the Throne, the whole land has been under Imperial rule, admitting of no challenge." All these records above cited go to show the dignity of the Tenno, and, therefore, of the state. Even further down in the medieval feudal ages, when the military class was in the ascendancy, giving rise to what is called "military rule," the people's reverence for the Tenno and the Imperial Family showed no change whatever. It is true, the government of the whole land was assumed by the successive shoguns instead of the Tenno, but it must be remembered that it was carried out solely by Imperial commission. Indeed, in handling the affairs of the state, the military class always stood on its own responsibility, ever mindful not to cause trouble to the Imperial Family. Nothing was done without Imperial sanction, which was in fact subject to the Tenno's august will. This means that the authority of government was, in the strictest sense, in the hands of the Tenno. Kitabatake

Chikafusa says about the assumption by Minamoto Yoritomo, Commander-in-Chief of the Army, of the sovereignty, thus: "Yoritomo was appointed to the highest post of Protector of the land. All this was due to sanction by the ex-Tenno. There is no reason for our concluding that he trespassed on the Imperial authority." Chikafusa was right in bringing forth this argument, for, in fact, Yoritomo had profound reverence for the Imperial Family in spite of the fact that he was the originator of military rule and was hated on all hands. In his letter to Hatatsune-Ason, dated February 25, the 3rd year of Juei (1185 A.D.), he said: "Ours is the gods' chosen land." He also writes somewhere: "More than sixty provinces constituting the land are all without an exception the possessions of the Grand Shrine at Ise." These facts amply prove the loyalty of Yoritomo. The same may be said of Hojo Yoshitoki, who after the extinction of the Minamoto family, being unwilling to restore the sovereignty to the Tenno, assumed it himself to the indignation of the ex-Tenno, Go-Toba Jo-o, culminating in the Civil War of the Shokyu Era (1221 A. D.). He is considered a traitor to the Imperial Family, but still he had no real intention of opposing the Imperial Family, for he instructed his son Yoshitoki in these words: "Should you meet His Majesty taking the field in person, you should forthwith surrender, throwing aside your bows and arrows." This is clearly confirmed by the son's apologies to Myōkei Shōnin, the priest, intended to

clarify the stand of his father Yoshitoki: "We do not mean purposely to mislead His Majesty. Our real intention is to punish his personal attendants for their wrong-doing." Nor can Ashikaga Takauji be justly called a traitor. He indeed started a rebellion against the then Tenno, but still he had not lost his respect for the Imperial Family, which may be seen in these words attributed to him: "We have not standard on our side equal to the Imperial standard, so that we are very much like traitors. After all, Jimyōin-dono is of legitimate descent of the Tenno... better beg him to issue a proclamation and march with the Imperial standard at the head." Thus Takauji won Jimyōin-dono to his side and proceeded to rise in rebellion,... a sure proof that even the traitor could not overlook the unchallengeable dignity of the long Imperial line, and, therefore, of the state.

Toward the end of the Tokugawa regime, when the military government had reached its zenith of ascendancy, and its corruption and degeneration was everywhere in evidence, men gradually turned to entertain an aspiration for the old Imperial regime. This tendency was accelerated by the revival of Japanese classical studies as against the encroachment of European and American nations on these shores, resulting in the successful restoration of the sovereignty to the hands of the Tenno. It is significant to note that this reverence for the Imperial Family had long before been fostered by Tokugawa

Mitsukuni, the head of the Mito clan, which was one of the three important clans of the Tokugawas, and that Mitsukuni cherished the opinion that the Tenno was the real Sovereign of the country, while the Shogun, who conducted the government of the country, was nothing more than the head of the family standing over all the people but next to the Tenno. With such an idea as the guiding principle he wrote the famous *Dai Nippon shi*, in which originated the so-called *Mito-gaku*, i.e. Mitology, primarily intended to clarify the distinction between the Sovereign and the people and to inculcate the spirit of reverence for the Imperial Family. It was indeed owing to this spirit that the great change—the restoration of the sovereign power to the hands of the Tenno—was effected without much bloodshed, although some pro-Shogunate elements at first offered resistance either out of ignorance or from a mistaken idea of loyalty to the Shogun or from a self-centred motive. Tokugawa Keiki, the fifteenth and last Shogun, with whose surrender of the sovereign power the Tokugawa régime came to an end, afterward told Prince Ito Hirobumi, one of the foremost statesmen Japan has produced since the Restoration, that in thus surrendering the sovereign power to the Tenno he simply obeyed his family precepts, having constantly been told by his father, Nariaki, to render whatever assistance he could in the cause of the Imperial Family and never to dare to rise in arms against it even should there arise any differ-

ence between the two sides, this being among the instructions left by Mitsukuni, the head of the Mito family, from which the Tokugawa family branched out. This circumstance again testifies to the fact that the dignity of the Imperial Family was always a ruling sentiment in the minds not only of the last Shogun but of all the preceding Shoguns—a fact sufficient to lend to the Meiji Restoration a glory nowhere seen in connection with mere political reform.

The dignity of the state, to illustrate which so many instances have been cited, may still be discussed from another angle—the functional side. Viewed from this standpoint, the state may indeed be called not only dignified but noble, for there is something morally precious about it. What is that something? It is the way of government carried on by the state—the Tenno's Way. It is amply evidenced by the rule of the successive Tenno based on moral principles, which fact is solemnly declared in the Imperial Rescript on education, thus: "Our Imperial Ancestors have deeply and firmly implanted virtue." Such a noble way of government is nothing like the mere practice of an imitated idea; far from it, it is a government carried on without variation the descendants in flesh and blood of the Imperial by Ancestors. No wonder it is called *Kōdō seiji* or *Kan-Nagara-no-Michi*.

One may ask: What is there at the basis of such government that makes it morally valuable,

and, therefore, noble—sublime? The answer is quite simple, that it is all because the Imperial Throne is always succeeded to by a descendant of the ancestor gods—a living god. No wonder that this living god, the Tenno, should govern in a godlike way. As has already been referred to, the Tenno's Rescripts had always the effect of *nori* (law), because, indeed, those Rescripts were in perfect conformity with the gods' wishes—revelations of the gods' will. It was for this reason that, in conducting the affairs of state in ancient times, the divine will was always sought by means of divination, and in perfect conformity to the result of such divination every action was taken so that sincerity might not be lost sight of in any case. Criminal trials, too, were conducted according to the gods' will, and all evils and sins were also exorcised before the altar. All this is the practice of the Ancestor Gods' Way, and this indeed gave rise to the fundamental spirit of Shintoism which is at the background of the state. When Jimmu Tenno ascended the Throne, he declared: "Let Us respond to Our Ancestor Gods for their favour of granting this land to Us on one hand, while on the other inculcate the love of justice among Our descendants." Further he said: "In establishing the law of the state, the need of the time should always be had in view. If it is of benefit to the people, how could it be against the way of the gods?" Here the intentions of the Tenno were self-evident, admitting of no speculation.

Sujin Tenno, the tenth Tenno, declared in the 4th year after his accession to the Throne: "It was from no private interest that Our Imperial Ancestors ascended the Throne in the past. It was solely in order to bring men and the gods into communion and thus administer the affairs of the land. For this very reason have Our Ancestors achieved sacred deeds generation after generation and made themselves examples of virtue." The Tenno further declared that, in succeeding to the Throne handed down by the Imperial Ancestors, there was no better way for him to follow than to coöperate with his courtiers and officials so as to ensure the welfare of the people and the peace of the land. From these words one may clearly understand with what sincere determination the Tenno set about his rule of the land. For all this, however, there followed in the fifth year of his reign a general outbreak of epidemics all over the country, causing death to half the population, for so it is recorded, and in consequence, in the sixth year, the people became separated from one another, some indeed running riot. The Tenno realized the futility of his virtuous rule, and sighed, saying: "Since Our Imperial Ancestors laid the foundation of the country in the long past, the successive Tenno have shown brilliant results in the pursuance of their task, and their virtuous ways have had an admirable influence far and wide. To reflect, however, that such calamities should have befallen so unexpectedly in this Our

reign of reigns! Could We have failed to administer righteous government and have incurred the displeasure of the gods?" Divination after divination, oracle after oracle was sought for and all possible rituals and functions were performed in offering prayers to the "Eight Million Gods." The epidemics were stamped out, the people were subdued, abundant crops were harvested, and joy came again to the people. Now is not this the practice of the Ancestor Gods' Way? Is not this the manifestation of the spirit of the foundation of the Empire? One may readily understand how eager the Tenno was for the realization of virtuous government. When he launched an expedition to pacify the people in the remotest parts of the country, in the tenth year, he meant, not to suppress those people by force of arms, but by the influence of virtue, as may be seen in his Rescript issued at that time: "Guidance of the people is effected by moral influence." These and still other countless instances, which Japanese history provides and which for reasons of space will be left untouched, all combine to confirm the moral principle on which Imperial government is based, which, solely on that account, inspires one with the dignity of the successive Tenno and, therefore, of the state. Again, solely for such dignity is this state held in deep respect, which circumstance in turn still further solidifies its imperishability.

To cut the present discussion short, there are still two other points characterizing the Japanese state.

One is the unity of the Imperial Family and the subjects. The subjects exist as branch families of the former, which is a fact chiefly contributory to the stability of the state. It is a fact clearly revealed in all institutions of the country, whether in law or in art or in custom and so on, and leads one to reflect that the state is but an enlargement of a family which existed as the nucleus in the beginning. It is a fact responsible for the stern existence of the family system peculiar to Japan. It gave rise to the idea of the identity of loyalty to the Tenno and filial piety. It gave rise to reverence to the gods and the worship of ancestors. All these ideas are correlative to one another, each being the cause of another.

Last, but far from least, is the absoluteness of the Japanese state. This is an idea to be pitted against all questions which may be put concerning the imperishability of the state. One may ask, for instance : Is it reasonable to suppose that the Japanese state will last for ever and ever solely because past history furnishes records testifying to the fact of the state having existed so long? How could we guarantee the eternity of the state on the basis of past history? All these questions are right so far as they go, but one must remember that all the references hitherto made to past history were a means to an end only, beyond which no one could go without basing himself on belief or on logic, as in the case of Westerners' belief in God. The imperish-

ability of the Japanese state is the faith of the Japanese people. If any Westerner were to denounce such belief as unaccountable, it might be because he had never had faith in the imperishability of his own state. It might be because he had never dreamed of the possibility of the eternity of his own state, due to all the changes and vicissitudes through which his state has come in the past. When one observes the universe, one will recognize that facts give birth to categories and the categories in turn control the facts. Facts are real and categories point to probability. The two are inseparable, united into one, beyond which, higher yet, there is one principle. This principle, which may be called the truth of the universe, pervades through past, present, and future, regardless of differences in state structure, in race, and in all other things, transcending time and space. It is an infinite reality, universal and pertinent all through the universe. On this absolute truth is built up the Empire of Japan, for so believe the Japanese, at least in the author's opinion.

The Japanese Constitution is, as has been said in the earlier pages of this book, characterized by so many distinctive points of its own, behind which there are at least four peculiarities of the state serving as their support. These are, to repeat, (a) the imperishability of the state, (b) the dignity of the Tenno, and therefore, of the state, (c) the unity of the Tenno and his subjects, and (d) the absoluteness of the state. All these points have been dealt

with by reference to historical records as much as possible, and, as has been pointed out, any question that may be raised against the truth of these points, particularly the imperishability of the state, will melt away once the questioner takes into serious consideration the peculiar Japanese faith on which these points are founded, strongly supported, of course, by historical facts in the sense that whatever has been, shall be for ever. To a Westerner, however, such a logicizing process may appear simply absurd; to a Japanese it is quite natural, forbidding all contradiction. True, with the advance of all branches of learning, attempts have constantly been made to shatter the myths that have long shrouded the creation of the world, the origin of the various races, nay, even the beginning of life. True, there are some histories of the Japanese people by Western authors in which all possible researches, nay even surmises, are set forth in the name of truth and research, in an attempt to throw what they consider true light on the origin of the Yamato race and what not concerning this Empire. These books are indeed read by the Japanese, both young and old, in all classes of society. Thus the intelligent class of Japan is fully aware of what is said of their country, of the origin of the race, of the history, and so forth, and therefore one may suppose that the Japanese may have by this time more or less wavered in such faith. However, for all such supposition, which is possible, it is a highly satisfactory

phenomenon that there has never been any single fact whatever confirming this supposition. Far from it, the Japanese have ever stood firm and unmoved in their faith, in spite of the scientific advance, international turmoil, revolutions abroad, and changes in human thought, witnessed throughout ancient, mediaeval, and modern times. It is a pride, a glory, an honour of the Japanese people, who are perfectly contented and happy under the benevolent rule of the virtuous Tenno, who is of divine origin, is a living god, and is of an unbroken sacred lineage. Let those who would challenge such faith have their way, the Japanese race will last as long as the world shall last, united in their faith under the virtuous Tenno, who is the head of this Grand Family; and just as long will the Japanese state last, like the sun in the heavens, which symbolizes the Empire of Japan!

APPENDICES

THE CONSTITUTION OF THE EMPIRE OF JAPAN

PREAMBLE

Having, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of State, to exhibit the principles by which We are to be guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The rights of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Teikoku Gikai shall first be convoked for the 23rd year of Meiji, and the time of its opening shall be the date when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Teikoku Gikai. The Teikoku Gikai shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.

(His Imperial Majesty's Sign-Manual.)

(Privy Seal.)

The 11th day of the 2nd month of the 22nd year of Meiji.

(Countersigned)	Count Kuroda Kiyotaka, <i>Minister President of State.</i>
	Count Ito Hirobumi, <i>President of the Privy Council.</i>
	Count Okuma Shigenobu, <i>Minister of State for Foreign Affairs.</i>
	Count Saigo Tsukumichi, <i>Minister of State for the Navy.</i>
	Count Inouye Kaoru, <i>Minister of State for Agriculture and Commerce.</i>
	Count Yamada Akiyoshi, <i>Minister of State for Justice.</i>
	Count Matsugata Masayoshi, <i>Minister of State for Finance and Minister of State for Home Affairs.</i>

Count Oyama Iwao,
Minister of State for War.

Viscount Mori Arinori,
Minister of State for Education.

Viscount Enomoto Takeaki,
Minister of State for Communications.

THE CONSTITUTIONAL LAW OF THE EMPIRE OF JAPAN

CHAPTER I THE TENNO

ARTICLE I

The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal.

ARTICLE II

The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

ARTICLE III

The Tenno is sacred and inviolable.

ARTICLE IV

The Tenno stands at the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

ARTICLE V

The Tenno exercises the legislative power with the consent of the Teikoku Gikai.

ARTICLE VI

The Tenno gives sanction to laws, and orders them to be promulgated and executed.

ARTICLE VII

The Tenno convokes the Teikoku Gikai, opens, closes and prorogues it, and dissolves the House of Representatives.

ARTICLE VIII

The Tenno, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Teikoku Gikai is not sitting, Imperial Ordinances in the place of law.

Such Imperial Ordinances are to be laid before the Teikoku Gikai at its next session, and when the Gikai does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

ARTICLE IX

The Tenno issues or causes to be issued, the Ordinances necessary for the carrying out of the laws or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

ARTICLE X

The Tenno determines the organization of the different branches of the administration and the salaries of all civil and military officers, and appoints and dismisses the same. Exceptions specially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).

ARTICLE XI

The Tenno has the supreme command of the Army and Navy.

ARTICLE XII

The Tenno determines the organization and peace standing of the Army and Navy.

ARTICLE XIII

The Tenno declares war, makes peace, and concludes treaties.

ARTICLE XIV

The Tenno declares a state of siege.

The conditions and effects of a state of siege shall be determined by law.

ARTICLE XV

The Tenno confers titles of nobility, rank, orders and other marks of honor.

ARTICLE XVI

The Tenno orders amnesty, pardon, commutation of punishments and rehabilitation.

ARTICLE XVII

A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

The Regent shall exercise the powers appertaining to the Tenno in His name.

CHAPTER II

RIGHTS AND DUTIES OF SUBJECTS

ARTICLE XVIII

The conditions necessary for being a Japanese subject shall be determined by law.

ARTICLE XIX

Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.

ARTICLE XX

Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.

ARTICLE XXI

Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

ARTICLE XXII

Japanese subjects shall have the liberty of abode and of changing the same within the limits of law.

ARTICLE XXIII

No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

ARTICLE XXIV

No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

ARTICLE XXV

Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

ARTICLE XXVI

Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

ARTICLE XXVII

The right of property of every Japanese subject shall remain inviolate.

Measures necessary to be taken for the public benefit shall be provided for by law.

ARTICLE XXVIII

Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

ARTICLE XXIX

Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.

ARTICLE XXX

Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.

ARTICLE XXXI

The provisions contained in the present Chapter shall not affect the exercise of the powers appertaining to the Tenno, in times of war or in cases of national emergency.

ARTICLE XXXII

Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

CHAPTER III

THE TEIKOKU GIKAI

ARTICLE XXXIII

The Teikoku Gikai shall consist of two Houses, a House of Peers and a House of Representatives.

ARTICLE XXXIV

The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those persons who have been nominated thereto by the Tenno.

ARTICLE XXXV

The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.

ARTICLE XXXVI

No one can at one and the same time be a Member of both Houses.

ARTICLE XXXVII

Every law requires the consent of the Teikoku Gikai.

ARTICLE XXXVIII

Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.

ARTICLE XXXIX

A bill, which has been rejected by either the one or

the other of the two Houses, shall not be again brought in during the same session.

ARTICLE XL

Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

ARTICLE XLI

The Teikoku Gikai shall be convoked every year.

ARTICLE XLII

A session of the Teikoku Gikai shall last for three months. In case of necessity, the duration of a session may be prolonged by Imperial Order.

ARTICLE XLIII

When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.

The duration of an extraordinary session shall be determined by Imperial Order.

ARTICLE XLIV

The opening, closing, prolongation of a session and the prorogation of the Teikoku Gikai, shall be effected simultaneously for both Houses.

In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

ARTICLE XLV

When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be

newly elected, and the new House shall be convoked within five months from the day of dissolution.

ARTICLE XLVI

No debate can be opened and no vote can be taken in either House of the Teikoku Gikai, unless not less than one third of the whole number of Members thereof are present.

ARTICLE XLVII

Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.

ARTICLE XLVIII

The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

ARTICLE XLIX

Both Houses of the Teikoku Gikai may respectively present addresses to the Tenno.

ARTICLE L

Both Houses may receive petitions presented by subjects.

ARTICLE LI

Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

ARTICLE LII

No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or

for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

ARTICLE LIII

The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offences connected with a state of internal commotion or with a foreign trouble.

ARTICLE LIV

The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

CHAPTER IV

THE MINISTERS OF STATE AND THE PRIVY COUNCIL

ARTICLE LV

The respective Ministers of State shall give their advice to the Tenno, and be responsible for it.

All Laws, Imperial Ordinances and Imperial Rescripts of whatever kind, that relate to affairs of State, require the countersignature of a Minister of State.

ARTICLE LVI

The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Tenno.

CHAPTER V

THE JUDICATURE

ARTICLE LVII

The Judicature shall be exercised by the Courts of Law according to law, in the name of the Tenno.

The organization of the Courts of Law shall be determined by law.

ARTICLE LVIII

The judges shall be appointed from among those who possess proper qualifications according to law.

No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

Rules for disciplinary punishment shall be determined by law.

ARTICLE LIX

Trials and judgements of a Court shall be conducted publicly. When, however, there exists any fear, that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provision of law or by the decision of the Court of Law.

ARTICLE LX

All matters, that fall within the competency of a special Court, shall be specially provided for by law.

ARTICLE LXI

No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of

the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

CHAPTER VI FINANCE

ARTICLE LXII

The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided for in the Budget, shall require the consent of the Teikoku Gikai.

ARTICLE LXIII

The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

ARTICLE LXIV

The expenditure and revenue of the State require the consent of the Teikoku Gikai by means of an annual Budget.

Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Teikoku Gikai.

ARTICLE LXV

The Budget shall be first laid before the House of Representatives.

ARTICLE LXVI

The expenses of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Teikoku Gikai, except in case an increase thereof is found necessary.

ARTICLE LXVII

Those already fixed expenditures based by the Constitution upon the powers appertaining to the Tenno, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Teikoku Gikai, without the concurrence of the Government.

ARTICLE LXVIII

In order to meet special requirements, the Government may ask the consent of the Teikoku Gikai to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.

ARTICLE LXIX

In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided for in the Budget.

ARTICLE LXX

When the Teikoku Gikai cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

In the case mentioned in the preceding clause, the matter shall be submitted to the Teikoku Gikai at its next session, and its approbation shall be obtained thereto.

ARTICLE LXXI

When the Teikoku Gikai has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

ARTICLE LXXII

The final account of the expenditures and revenue of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Teikoku Gikai, together with the report of verification of the said Board.

The organization and competency of the Board of Audit shall be determined by law separately.

CHAPTER VII SUPPLEMENTARY RULES

ARTICLE LXXIII

When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Teikoku Gikai by Imperial Order.

In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained.

ARTICLE LXXIV

No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Teikoku Gikai.

No provision of the present Constitution can be modified by the Imperial House Law.

ARTICLE LXXV

No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.

ARTICLE LXXVI

Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

All existing contracts or orders, that entail obligations upon the Government, and that are connected with expenditure, shall come within the scope of Art. LXVII.

THE IMPERIAL OATH
AT THE
SANCTUARY OF THE IMPERIAL PALACE

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the

glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make our prayer to Them and to Our Illustrious Father, and implore the help of Their Spirits, and make to Them a solemn oath never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.

May the Heavenly Spirits witness this Our solemn Oath.

THE IMPERIAL SPEECH ON THE PROMULGATION OF THE CONSTITUTION

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by our Imperial Ancestors.

THE IMPERIAL SPEECH SANCTIONING THE IMPERIAL HOUSE LAW

The Imperial Throne of Japan, enjoying the Grace of Heaven and everlasting from ages eternal in an unbroken line of succession, has been transmitted to Us through the successive reigns. The fundamental rules of Our Family were established once for all, at the time that Our Ancestors laid the foundations of the Empire, and are even at this day as bright as the celestial luminaries. We now desire to make the instructions of Our Ancestors more exact and express and to establish for Our posterity a House Law, by which Our House shall be founded in everlasting strength, and its dignity be forever maintained. We hereby, with the advice of Our Privy Council, give Our Sanction to the present Imperial House Law, to serve as a standard by which Our descendants shall be guided.

(His Imperial Majesty's Sign-Manual.)

(Privy Seal.)

The 11th day of the 2nd month of the 22nd year of Meiji.

THE IMPERIAL HOUSE LAW

CHAPTER I

SUCCESSION TO THE IMPERIAL THRONE

ARTICLE I

The Imperial Throne of Japan shall be succeeded to by male descendants in the male line of Imperial Ancestors.

ARTICLE II

The Imperial Throne shall be succeeded to by the Imperial eldest son.

ARTICLE III

When there is no Imperial eldest son, the Imperial Throne shall be succeeded to by the Imperial eldest grandson. When there is neither Imperial eldest son nor any male descendant of his, it shall be succeeded to by the Imperial son next in age, and so on in every successive case.

ARTICLE IV

For succession to the Imperial Throne by an Imperial descendant, the one of full blood shall have precedence over descendants of half blood. The succession to the Imperial Throne by the latter shall be limited to those cases only when there is no Imperial descendant of full blood.

ARTICLE V

When there is no Imperial descendant, the Imperial Throne shall be succeeded to by an Imperial brother and by his descendants.

ARTICLE VI

When there is no such Imperial brother or descendant of his, the Imperial Throne shall be succeeded to by an Imperial uncle and by his descendants.

ARTICLE VII

When there is neither such Imperial uncle nor descendant of his, the Imperial Throne shall be succeeded to by the next nearest member among the rest of the Imperial Family.

ARTICLE VIII

Among the Imperial brothers and the remoter Imperial relations, precedence shall be given, in the same degree, to the descendants of full blood over those of half blood, and to the elder over the younger.

ARTICLE IX

When the Imperial heir is suffering from an incurable disease of mind or body, or when any other weighty cause exists, the order of succession may be changed in accordance with the foregoing provisions, with the advice of the Imperial Family Council and with that of the Privy Council.

CHAPTER II**ASCENSION AND CORONATION****ARTICLE X**

Upon the demise of the Tenno, the Imperial heir shall ascend the Throne, and shall acquire the Divine Treasures of the Imperial Ancestors.

ARTICLE XI

The ceremonies of Coronation shall be performed and a Grand Coronation Banquet (Daijosai) shall be held at Kyoto.

ARTICLE XII

Upon an ascension to the Throne, a new era shall be inaugurated, and the name of it shall remain unchanged during the whole reign, in agreement with the established rule of the 1st year of Meiji.

CHAPTER III

MAJORITY INSTITUTION OF EMPRESS AND OF HEIR-APPARENT

ARTICLE XIII

The Tenno, the Kōtaishi and the Kōtaison shall attain their majority at eighteen full years of age.

ARTICLE XIV

Members of the Imperial Family, other than those mentioned in the preceding Article, shall attain their majority at twenty full years of age.

ARTICLE XV

The son of the Tenno who is Heir-apparent, shall be called "Kōtaishi." In case there is no Kōtaishi, the Imperial grandson who is Heir-apparent, shall be called "Kōtaison."

ARTICLE XVI

The institution of Empress and that of Kōtaison shall be proclaimed by an Imperial Rescript.

CHAPTER IV STYLES OF ADDRESS

ARTICLE XVII

The style of address for the Tenno, the Grand Empress Dowager, the Empress Dowager and the Empress, shall be His, or Her or Your Majesty.

ARTICLE XVIII

The Kōtaishi and his consort, the Kōtaison and his consort, the Imperial Princes and their consorts, and the Princesses shall be styled His, Her, Their or Your Highness or Highnesses.

CHAPTER V REGENCY

ARTICLE XIX

When the Tenno is a minor, a Regency shall be instituted.

When He is prevented by some permanent cause from personally governing, a Regency shall be instituted, with the advice of the Imperial Family Council and with that of the Privy Council.

ARTICLE XX

The Regency shall be assumed by the Kōtaishi or the Kōtaison, being of full age of majority.

ARTICLE XXI

When there is neither Kōtaishi nor Kōtaison, or when the Kōtaishi or Kōtaison has not yet arrived at his majority, the Regency shall be assumed in the following order:—

1. An Imperial Prince or a Prince.
2. The Empress.
3. The Empress Dowager.
4. The Grand Empress Dowager.
5. An Imperial Princess or a Princess.

ARTICLE XXII

In case the Regency is to be assumed from among the male members of the Imperial Family, it shall be done in agreement with the order of succession to the Imperial Throne. The same shall apply to the case of female members of the Imperial Family.

ARTICLE XXIII

A female member of the Imperial Family to assume the Regency, shall be exclusively one who has no consort.

ARTICLE XXIV

When, on account of the minority of the nearest related member of the Imperial Family, or for some other cause, another member has to assume the Regency, the latter shall not, upon the arrival at majority of the above mentioned nearest related member, or upon the disappearance of the aforesaid cause, resign his or her post in favour of any person other than of the Kōtaishi or of the Kōtaison.

ARTICLE XXV

When a Regent or one who should become such, is suffering from an incurable disease of mind or body, or when any other weighty cause exists therefor, the order of the Regency may be changed, with the advice of the Imperial Family Council and with that of the Privy Council.

CHAPTER VI

THE IMPERIAL GOVERNOR

ARTICLE XXVI

When the Tenno is a minor, an Imperial Governor shall be appointed to take charge of His bringing up and of His education.

ARTICLE XXVII

In case no Imperial Governor has been nominated in the will of the preceding Tenno, the Regent shall appoint one, with the advice of the Imperial Family Council and with that of the Privy Council.

ARTICLE XXVIII

Neither the Regent nor any of his descendants can be appointed Imperial Governor.

ARTICLE XXIX

The Imperial Governor can not be removed from his post by the Regent, unless upon the advice of the Imperial Family Council and upon that of the Privy Council.

CHATER VII

THE IMPERIAL FAMILY

ARTICLE XXX

The term "Imperial Family" shall include the Grand Empress Dowager, the Empress Dowager, the Empress, the Kōtaishi and his consort, the Kōtaison and his consort, the Imperial Princes and their consorts, the Imperial Princesses, the Princes and their consorts, and the Princesses.

ARTICLE XXXI

From Imperial sons to Imperial great-great-grandsons, Imperial male descendants shall be called Imperial Princes; and from Imperial daughters to Imperial great-great-granddaughters, Imperial female descendants shall be called Imperial Princesses. From the fifth generation downwards, male descendants shall be called, Princes, and female ones Princesses.

ARTICLE XXXII

When the Imperial Throne is succeeded to by a member of a branch line, the title of Imperial Prince or Imperial Princess shall be specially granted to the Imperial brothers and sisters, being already Princes or Princesses.

ARTICLE XXXIII

The births, namings, marriages and deaths in the Imperial Family shall be announced by the Minister of the Imperial Household.

ARTICLE XXXIV

Genealogical and other records relating to the matters mentioned in the preceding Article shall be kept in the Imperial archives.

ARTICLE XXXV

The members of the Imperial Family shall be under the control of the Tenno.

ARTICLE XXXVI

When a Regency is instituted, the Regent shall exercise the power of control referred to in the preceding Article.

ARTICLE XXXVII

When a member, male or female, of the Imperial Family is a minor and has been bereft of his or her father, the officials of the Imperial Court shall be ordered to take charge of his or her bringing up and education. Under certain circumstances, the Tenno may either approve the guardian chosen by his or her parent, or may nominate one.

ARTICLE XXXVIII

The guardian of a member of the Imperial Family must be himself a member thereof and of age.

ARTICLE XXXIX

Marriages of members of the Imperial Family shall be restricted to the circle of the Family, or to certain noble families specially approved by Imperial Order.

ARTICLE XL

Marriages of the members of the Imperial Family shall be subject to the sanction of the Tenno.

ARTICLE XLI

The Imperial writs sanctioning the marriages of members of the Imperial Family, shall bear the countersignature of the Minister of the Imperial Household.

ARTICLE XLII

No member of the Imperial Family can adopt any one as his son.

ARTICLE XLIII

When a member of the Imperial Family wishes to travel beyond the boundaries of the Empire, he shall first obtain the sanction of the Tenno.

ARTICLE XLIV

A female member of the Imperial Family, who has married a subject, shall be excluded from the membership of the Imperial Family. However, she may be allowed, by the special grace of the Tenno, to retain her title of Imperial Princess or of Princess, as the case may be.

CHAPTER VIII
IMPERIAL HEREDITARY ESTATES

ARTICLE XLV

No landed or other property, that has been fixed as the Imperial Hereditary Estates, shall be divided up and alienated.

ARTICLE XLVI

The landed and other property to be included in the Imperial Hereditary Estates, shall be settled by an Imperial writ, with the advice of the Privy Council, and shall be announced by the Minister of the Imperial Household.

CHAPTER IX
EXPENDITURE OF THE IMPERIAL HOUSE

ARTICLE XLVII

The expenses of the Imperial House of all kinds shall be defrayed out of the National Treasury at a certain fixed amount.

ARTICLE XLVIII

The estimates and audit of accounts of the expenditures of the Imperial House and all other rules of the kind, shall

be regulated by the Finance Regulations of the Imperial House.

CHAPTER X

LITIGATIONS AND DISCIPLINARY RULES FOR THE MEMBERS OF THE IMPERIAL FAMILY

ARTICLE XLIX

Litigation between members of the Imperial Family shall be decided by judicial functionaries specially designated by the Emperor to the Department of the Imperial Household, and execution issued, after Imperial Sanction thereto has been obtained.

ARTICLE L

Civil actions brought by private individuals against members of the Imperial Family, shall be decided in the Court of Appeal in Tokyo. Members of the Imperial Family shall, however, be represented by attorneys, and no personal attendance in the Court shall be required of them.

ARTICLE LI

No member of the Imperial Family can be arrested, or summoned before a Court of Law, unless the sanction of the Emperor has been first obtained thereto.

ARTICLE LII

When a member of the Imperial Family has committed an act derogatory to his (or her) dignity, or when he has exhibited disloyalty to the Imperial House, he shall, by way of disciplinary punishment and by order of the Tenno, be

deprived of the whole or of a part of the privileges belonging to him as a member of the Imperial Family, or shall be suspended therefrom.

ARTICLE LIII

When a member of the Imperial Family acts in a way tending to the squandering of his (or her) property, he shall be pronounced by the Tenno, prohibited from administering his property, and a manager shall be appointed therefor.

ARTICLE LIV

The two foregoing Articles shall be sanctioned, upon the advice of the Imperial Family Council.

CHAPTER XI

THE IMPERIAL FAMILY COUNCIL

ARTICLE LV

The Imperial Family Council shall be composed of the male members of the Imperial Family, who have reached the age of majority. The Lord Keeper of the Privy Seal, the President of the Privy Council, the Minister of the Imperial Household, the Minister of State for Justice and the President of the Court of Cassation shall be ordered to take part in the deliberations of the Council.

ARTICLE LVI

The Tenno personally presides over the meeting of the Imperial Family Council, or directs one of the members of the Imperial Family to do so.

CHAPTER XII

SUPPLEMENTARY RULES

ARTICLE LVII

Those of the present members of the Imperial Family of the fifth generation and downwards, who have already been invested with the title of Imperial Prince, shall retain the same as heretofore.

ARTICLE LVIII

The order of succession to the Imperial Throne shall in every case relate to the descendants of absolute lineage. There shall be no admission to this line of succession of any one, as a consequence of his now being an adopted Imperial son, Kôyûshi or heir to a princely house.

ARTICLE LIX

The grades of rank among the Imperial Princes, Imperial Princesses, Princes and Princesses shall be abolished.

ARTICLE LX

The family rank of Imperial Princes and all usages conflicting with the present Law, shall be abolished.

ARTICLE LXI

The property, annual expenses and all other rules concerning the members of the Imperial Family, shall be specially determined.

ARTICLE LXII

When in the future it shall become necessary either to amend or make additions to the present Law, the matter shall be decided by the Tenno, with the advice of the Imperial Family Council and with that of the Privy Council.

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